Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

LINDA DAVIS, fka Linda Beveridge,
Petitioner

v.

RICHARD JONES AND CAROLYN JONES,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Issue I: Did the Iosco (Michigan) circuit court exceed its jurisdiction and violate the Indian Child Welfare Act (25 USC §§1901 *et seq.*) by

A. failing to immediately restore full physical and legal custody of an Indian child to an Indian mother when, prior to and during trial the Indian mother expressed her desire to terminate a voluntarily-created limited guardianship and regain full physical and legal custody of the Indian child, as was the Indian mother's statutory right, 25 USC §1913(b);

B. acting without jurisdiction in violation of 25 USC §1920 by conducting a custody proceeding where the limited guardians retained custody of the Indian child after the Indian mother had expressed a desire to regain her custodial rights;

C. failing to require the limited guardians to notify the Indian child's Tribe of this foster care placement proceeding and of the Tribe's right to intervene under 25 USC §1912(a), which omission created a jurisdictional defect in all further proceedings;

D. failing to require the limited guardians to introduce qualified expert testimony to establish that active efforts had been made to avoid the breakup of an Indian family as required by 25 USC §1912(d);

where no finding was made that custody with the Indian mother would likely cause serious physical or emotional damage to the child and, to the contrary, the Michigan court granted the Indian mother liberal and unsupervised parenting time?

II. Did the Michigan courts err in failing to accord a natural mother's constitutional right to make reasonable decisions as to the care and custody of her child appropriate weight and importance, as required by *Troxel v Granville*, 530 US 57, 66; 120 S Ct 2054; 147 L Ed 2d 49 (2000)?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is Linda Davis. The parties to the state proceedings at issue were Timothy Beveridge, Linda Davis ex-husband (this case having begun as a divorce proceeding), Richard Jones (Mr. Beveridge's adoptive mother's ex-husband), and Carolyn Jones (Richard Jones current wife and former wife of Mr. Beveridge's adoptive father).

There are no corporations, limited liability companies, partnerships, limited partnerships, or juristic entities that are parties to this case. All natural persons party to this case are listed in the above paragraph.

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II. The Michigan court erred in failing to accord a natural mother's constitutional right to make reasonable decisions as to the care and custody of her child appropriate weight and importance, as required by *Troxel v Granville*, 530 US 57, 66; 120 S Ct 2054; 147 L Ed 2d 49 (2000). 28

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The Michigan Supreme Court's order denying rehearing is officially reported at 469 Mich ___; 671 NW2d 44 (2003), and is reproduced at Pet. Apx. 2a (Appendix B).

The Michigan Court of Appeals decision issued January 24, 2003 is unreported (but found at 2003 Westlaw 198011), and is reproduced at Pet. Apx. 3a (Appendix C).

The unreported Michigan Court of Appeals' order denying rehearing, issued March 4, 2003, is reproduced at Pet. Apx. __a (Appendix D).

The Iosco (Michigan) circuit court's order of June 7, 2002, granting custody of the Indian child to respondents, is unreported, and is reproduced at Pet. Apx. __a (Appendix E).

The Iosco (Michigan) circuit court's findings of fact were rendered from the bench on May 7, 2002, and are reproduced at Pet. Apx. __a (Appendix F).

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment entered by the Michigan Court of Appeals on January 24, 2003 in this case, as to which the Michigan Supreme Court has refused discretionary review.

JURISDICTION

The Michigan Supreme Court denied petitioner's timely application for leave to appeal raising the within federal

statutory and constitutional issues on July 24, 2003, and denied petitioner's timely motion for rehearing on October 31, 2003. The jurisdiction of this Court is based on 28 USC §1257(a) and Rule 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of 25 USC §1901 *et seq.*, and most especially §§1912(a), 1912(d), 1913(b), and 1920, Pet. Apx. 89a ff, (Appendix O) and §1 of the Fourteenth Amendment, Pet. Apx. 97a (Appendix Q).

STATEMENT

INTRODUCTION

Petitioner Linda Davis, an Indian mother and registered member of the Saginaw Chippewa Tribe of Indians, requests review by certiorari of a July 24, 2003 order of the Michigan Supreme Court (Pet. Apx. 1a), two justices dissenting, denying discretionary review (leave to appeal) of a January 24, 2003 decision of the Michigan Court of Appeals (Pet. Apx. 3a-19a), as to which a timely motion for rehearing was denied by order of March 4, 2003 (Pet. Apx. 20a), which affirmed an award of custody of plaintiff's natural Indian minor child, Jewel Beveridge, also a registered member of the Saginaw Chippewa tribe, to respondents, *non-Indian* paternal [adoptive and step-adoptive] grandparents. The Michigan Supreme Court denied Linda Davis' timely motion for rehearing on October 31, 2003 (Pet. Apx. 2a).

To achieve such a result, the Michigan Court of Appeals, hastened to excuse itself and the trial court—in violation of the Supremacy Clause of US Const, Art VI—from all obligation to comply with the Indian Child Welfare Act (ICWA), 25 USC §§1901 *et seq.* (Pet. Apx. 13a, footnote 6),

and to flatly ignore the Congressional purpose and intent underlying the ICWA.

The Michigan Court of Appeals' January 24, 2003 opinion stands these principles on their head by examining the case from the "wrong end of the telescope", blinded by the trial court's adverse findings based on state law principles. The ICWA is to be construed and applied in favor of Indians, *Bryan v Itasca Co, Minnesota*, 426 US 373, 392; 96 S Ct 2102; 48 L Ed 2d 710 (1976)[1], not, as the Michigan Court of Appeals has done, with a studied purpose to avoid the ICWA's mandates.

The Michigan Court of Appeals also ignored crucial documentary information that absolutely established Linda Davis' right to regain custody under 25 USC §1913(b). Petitioner first filed on December 11, 2000 a handwritten motion in the Iosco County (Michigan) family court—where limited guardianship of respondents over Jewel was initially created with petitioner's consent—*expressly demanding return of Jewel to her custody* (Pet. Apx. 53a-54a), and additionally invoked her federal rights under 25 USC §1913(b) in a May 11, 2001 circuit court motion for restoration of custody (Pet. Apx. 55a-57a). Given the Michigan Court of Appeals' focus on the timing of respondents' filing of their Motion for Custody on April 12, 2001 (Pet. Apx. 16a ff), and that court's Footnote 2 (Pet. Apx. 4a), which reflects that it overlooked or deliberately ignored this documentary record (despite the

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[1] "[W] e must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n. 7, 96 S.Ct. 1793, 1797, 48 L.Ed.2d 274 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918). See *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912); *Antoine v. Washington*, 420 U.S. 194, 199-200, 95 S.Ct. 944, 948-949, 43 L.Ed.2d 129 (1975)."

determination (Pet. Apx. 18a) that the probate court record is properly part of this appeal from *circuit* court[2]), it is inexplicable how the Michigan Court of Appeals could so completely overlook these controlling and repeatedly referenced exhibits, which established that *Linda Davis had repeatedly invoked her absolute federal right under 25 USC §1913(b) to withdraw her initial voluntary consent to the limited guardianship and require the return of Jewel to her custody.* 25 USC §1913(b) provides (emphasis added):

> (b) Foster care placement; withdrawal of consent
> **Any parent or Indian custodian may withdraw consent to a foster care placement under State law *at any time* and, upon such withdrawal, the child *shall be returned* to the parent or Indian custodian.**

In non-Michigan courts, the statute means exactly what it says. *In re Adoption of K.L.R.F.*, 356 Pa Super 555, 562-563; 515 A2d 33, 37 (1986), appeal granted 514 Pa 624; 522 A2d 50, appeal granted 514 Pa 625; 522 A2d 50, appeal dismissed 516 Pa 520; 533 A2d 708; *Matter of Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz 202, 207; 635 P2d 187, 192 (Ariz App, 1981). Yet 25 USC §1913(b) is entirely ignored in the Michigan Court of Appeals' opinion[3].

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[2] Michigan has recently instituted a family division of circuit court, which possesses both the traditional jurisdiction of a circuit court and the jurisdiction formerly exercised by the juvenile division of probate court. Mich Comp Laws §§600.1001 *et seq.* In any event, the Probate Court *record* (as opposed to proceedings not transcribed and filed with the Clerk of the Probate Court) would be a proper subject for judicial notice, *People v Snow*, 386 Mich 586, 591; 194 NW2d 314 (1972), which is why, without objection, Pet. Apx. I was properly attached to Linda Davis' (Michigan) Brief on Appeal, and its relevance and verisimilitude were never challenged.

[3] Likewise, without explanation or citation of authority, the Michigan Court of Appeals' treated Linda Davis' motion in circuit court, filed May 11, 2001, as somehow inadequate to invoke Ms. Davis' rights under 25 USC §1913(b), although acknowledging that the ICWA imposes no formal requirements for the making of such a demand. Both the circuit and

From December 11, 2000 forward, the Joneses' continued custody of Jewel was therefore in violation of controlling federal law, and could not serve as the basis for bootstrapping them into asserting an existing valid custodial placement in avoidance of the requirements of 25 USC §1911(b). Pursuant to 25 USC §1913(b), respondents were legally bound to return Jewel from and after December 11, 2000; the Michigan judiciary should have recognized that petitioner's superior *federal* rights were first in time.

Petitioner had appealed to the Michigan Court of Appeals by right a June 7, 2002 order (Pet. Apx. 21a ff) of the Iosco Circuit Court, which granted respondents' ("the Joneses") request for custody of then 4-year old Jewel.

The same circuit court order also limits the custodial rights of Timothy Beveridge, Jewel's natural, non-Indian father, as well as Ms. Davis' ex-husband, and Carolyn Jones' adoptive stepson by a previous marriage. Mr. Beveridge appeared *inops consilii* and supported Linda Davis' request for termination of the limited guardianship and restoration of full custodial rights to Jewel. (Mr. Beveridge also attended oral argument in the Michigan Court of Appeals and supported Ms. Davis' appeal.)

In its findings of fact from the bench on May 6, 2002 (Pet. Apx. 30a ff), the circuit court found all the parental candidates more or less flawed. While there was evidence which would support a finding that Ms. Davis, in a vacuum, might be a less desirable custodial parent for Jewel than the Joneses, this case does not arise in a vacuum. Ms. Davis is Jewel's natural mother, has successfully raised one adult daughter, and is success-fully rearing three other minor children (Pet. Apx. 70a). The circuit court, although critical

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probate court motions were independently sufficient under 25 USC §1913(b) to instantly terminate respondents' attempts to gain custody.

of Linda Davis in a number of respects, nonetheless granted her *extensive unsupervised* parenting time with Jewel—every Thursday from 6:00 p.m. until 6:00 p.m. Sunday, alternating weekends and holidays, and 2 full weeks in the summer (Pet. Apx. 22a). *Thus, that the circuit court manifestly does not deem Linda Davis an unfit parent, but merely a moderately less desirable custodial parent.* In its findings and ruling, the circuit court also totally ignored the fact that both Linda Davis and Jewel Beveridge are registered members of the Saginaw Chippewa Indian tribe.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit began as a simple divorce case with the filing of Linda Davis' complaint on September 17, 1998. Divorce was granted by order of May 10, 2000.

While the divorce action was pending, Linda Davis was arrested on a charge of felonious assault against then-husband Timothy Beveridge. While in custody, Linda Davis voluntarily consented to the appointment of her then-in laws, Richard and Carolyn Jones, as limited guardians of Jewel (Order Appointing Limited Guardian dated November 29, 1999, Pet. Apx. 46a, and supporting petition, Pet. Apx. 48a, 51a). Other relatives or friends took charge of Ms. Davis' other children.

At preliminary examination, the prosecutor's motion to dismiss the assault charge against Linda Davis was granted by the Michigan district court (TR II, pp. 31-34). Linda Davis then sought to regain custody of Jewel (Pet. Apx. 53a-54a) on Dec. 11, 2000 and May 11, 2001, but respondents' petitioned for custody on April 12, 2001. After a trial focusing on state law issues (summarized in Pet. Apx. 73a-88a), the circuit court entered its findings from the bench (Pet. Apx. 30a-44a) and granted respondents' petition, (Pet. Apx. 21a-29a) focusing exclusively on state law grounds (the "best interests

of the child" under Mich Comp Laws §722.23), correlatively ignoring the ICWA and giving no shrift whatever to Linda Davis' constitutional status as natural parent.

REASONS FOR GRANTING THE PETITION

The Indian Child Welfare Act is an important federal statute designed to protect the cultural integrity of American Indian families and tribes. This Court has given plenary review to questions arising under the ICWA in only two cases, *Bryan v Itasca Co, Minnesota*, 426 US 373; 96 S Ct. 2102; 48 L Ed 2d 710 (1976) and *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30; 109 S Ct 1597; 104 L Ed 2d 29 (1989), and thus has not addressed the ICWA for over fourteen years. Lower federal courts are fairly excluded from involvement in custody issues, because most domestic relations and child custody litigation occurs in the state courts and, being civil rather than criminal, is not subject to collateral federal review. The decision in this case by the Michigan judiciary is also at odds with application of the ICWA in other states.

As this case demonstrates, when this Court remains aloof from regularly upholding the important federal policies reflected in 25 USC §1901(3) (Pet. Apx. 89a), state judiciaries tend to elevate their own state's policies concerning child welfare above Congress' pronouncement on the subject. Then Indians like petitioner, who have a historical special relationship to the federal government, 25 USC §1901(2) (Pet. Apx. 89a), must turn to this Court for redress.

Likewise, although this Court held in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000) that natural parents' custodial rights can only be divested in favor of third parties if due consideration is given to their constitutional discretion to make reasonable child-rearing choices, here the Michigan judiciary has rendered that ruling

a dead letter. Again, review by this Court is the only avenue to protect petitioner's important federal constitutional rights.

Issue I: The Iosco (Michigan) circuit court exceeded its jurisdiction and violated the Indian Child Welfare Act (25 USC §§1901 *et seq.*)[4] by

A. failing to immediately restore full physical and legal custody to Linda Davis as required by 25 USC §1913(b) when, prior to and during trial (TR II, p.46), Linda Davis, an Indian mother, expressed her desire to terminate the voluntarily-created limited guardianship and regain full physical and legal custody of Jewel Davis, an Indian child;

B. acting without jurisdiction in violation of 25 USC §1920 by conducting a custody proceeding, where the limited guardians retained custody of the Indian child after the Indian mother had expressed a desire to regain her custodial rights;

C. failing to require the limited guardians to notify the Saginaw Chippewa Indian Tribe of this foster care placement proceeding and of the Tribe's right to intervene under 25 USC §1912(a), which omission created a jurisdictional defect in all further proceedings;

D. failing to require, pursuant to 25 USC §1912(d), the limited guardians to introduce qualified expert testimony to establish that active efforts had been made to avoid the breakup of an Indian family;

where no finding was made that custody with the Indian mother would likely cause serious physical or emotional damage to the child (to the contrary, the circuit court granted the Indian mother liberal and unsupervised parenting time three days per week, two weeks during the summer, and alternate holidays).

ISSUE PRESERVATION

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[4] Relevant provisions of the Indian Child Welfare Act are reproduced in Appendix O per Supreme Court Rule 14.1(f).

The record reflects that the ICWA was raised and addressed on the record at trial (TR III, pp. 31-36), which both sufficiently presented the issue and preserved the issue for appeal under state law. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). The circuit court acknowledged that the child is receiving "Indian benefits" (TR 5/6/02, p. 59) and that Linda Davis tribal court dealings established her status as an Indian (TR 4/26/02, p. 60). In any event, a Michigan court is empowered to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and resolved. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999).

The Michigan Court of Appeals opined that because, at a pretrial hearing, the circuit judge instructed Ms. Davis' trial counsel to submit a brief on the issue of the impact of the ICWA, the failure to submit a brief waived such issues. That was a clear mischaracterization of the trial judge's directive; the trial judge instructed petitioner's counsel to brief the matter only "[i]if you're contesting it in advance" of trial. (TR 2/15/04, p. 4, Pet. Apx. 67a). Ms. Davis was satisfied to obtain a ruling at the close of trial rather than in advance of trial, and no brief was thus required. Thus, there is no need to address whether the Michigan Court of Appeals' procedural assertion might constitute an "independent and adequate state procedural ground" for sustaining the decision below. *Cf. Sullivan v Little Hunting Park, Inc*, 396 US 229, 233-234; 90 S Ct 400; 24 L Ed 2d 386 (1969)[5].

Moreover, the ICWA is controlling federal law; its application is not dependent on the filing of a written brief

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[5] Moreover, no order requiring a brief under any circumstances was ever entered, and since under Michigan law courts speak only through their written orders, *Tiedman v Tiedman*, 400 Mich 571, 577 n. 4; 235 NW2d 652 (1977), this request by the trial judge was merely precatory and not mandatory, and certainly could not limit Linda Davis' right to present this clearly preserved federal issue on appeal.

in advance of any particular stage of trial. As the Michigan Court of Appeals itself has repeatedly held, "the trial court was bound to follow the law, notwithstanding the fact that it was not called to the court's attention." *People v Glover*, 47 Mich App 454, 458; 209 NW2d 533 (1973); *White v North Oakland Med Ctr* (Mich App No. 199443, March 4, 1998), slip op p 2. Here, of course, the ICWA was called to the trial court's attention during trial, (Pet. Apx. 59a-63a) as well as before trial; nothing further was required to preserve these issues for appeal even under state law. *Adam v Sylvan Glynn Golf Course, supra*, 197 Mich App at 98.

Moreover, given the mandate of 25 USC §1914[6], petitioner could properly raise any such issue for the first time on appeal; Congress has expressly dispensed with such procedural demands as preservation of issues in cases governed by the ICWA. Indeed, 25 USC §1914 provides grounds for attacking even final adjudications, where, as here, the notice requirements of §1912(a) have not been fulfilled. *Mississippi Band of Choctaw Indians v Holyfield, supra*, 490 US at 39 ff.

ANALYSIS

This issue presents a question as to the application of federal statutory law. Pursuant to US Const, art 1, §8, cl. 3, Congress has plenary power to regulate relationships with the Indian tribes. Pursuant to that constitutional delegation

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[6] 25 USC §1914 provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

of authority, Congress has enacted the Indian Child Welfare Act (ICWA), 25 USC §§1901 *et seq*.

The ICWA includes a Congressional statement of purpose and intent, which declare as follows:

> 25 USC §1901
> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—
> (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have

> often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.
>
> 25 USC §1902
> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

The federal law is thus by its explicitly designed and intended to prevent statute judiciaries from breaking up Indian families except in compelling and egregious cases.

It is undisputed that Linda Davis is an Indian, and her minor daughter, Jewel Davis, is an Indian child. 25 USC §1903(3) and (4)[8]. Both are registered members of the Saginaw Chippewa Indian Tribe. Carolyn Jones[9]

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[8] 25 USC §1903(3) and (4) provide:

> For the purposes of this chapter, except as may be specifically provided otherwise, the term –
> (3) "Indian" means any person who is a member of an Indian tribe . . .;
> (4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]

[9] While Carolyn Jones claimed to be a fifth generation descendant of Sacagawea (making her at best $1/64^{th}$ Indian), she did not claim to be a registered member of an Indian tribe or eligible to become one. Moreover, Sacagawea was a Shoshone, not a Chippewa, and thus Mrs. Jones cannot

acknowledged that Jewel is eligible for health insurance through the Tribe, and even the Joneses' trial counsel acknowledged that Linda Davis is of Indian heritage (TR 4/22/02, p. 158). The Saginaw Chippewa Tribe's recognition of both Linda Davis and Jewel Beveridge as tribal members, 25 USC §1903(3) and (4)—is *conclusive* of their Indian status; Indian tribes are arbitrators of their own membership for purposes of the Indian Child Welfare Act. *In Interest of JW*, 498 NW2d 417, 422 (Iowa App,.1993)[9].

It follows that Linda Davis, as to Jewel Beveridge, is an "Indian custodian" as defined by 25 USC §1903(6):

> (6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child[.]

It is undisputed that, as a result of the divorce judgment, Linda Davis had sole physical and legal custody of Jewel as between herself and Timothy Beveridge. Respondents, on the other hand, cannot satisfy the statutory definition, because neither is an "Indian person."

Linda Davis and Mr. Beveridge are similarly the only persons involved in this case who meet the Congressional definition of "parent" set forth in 25 USC §1903(9):

> (9) "parent" means any biological parent or parents of an Indian child or any Indian person who has

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qualify as an alternative (Indian) custodian, inasmuch as the ICWA looks to tribal affiliation, not mere Indian blood. 25 USC §1903(5). Nor does Mrs. Jones claim any knowledge or ability to raise Jewel in accordance with the unique values of Indian culture. 25 USC §1902.

[9] Tribal enrollment is a common way to establish Indian status, but not exclusive; *enrollment is a sufficient but not a necessary condition for Indian status. Nelson v Hunter*, 132 Or App 361; 888 P2d 124, 125-126 (1995).

lawfully adopted an Indian child, including adoptions under tribal law or custom.

However Michigan law characterizes the proceedings below, Congress, which has plenary power over Indian matters under the commerce clause, US Const, Art I, §8, cl. 3, and whose enactment is the "supreme law of the land," US Const, Art VI, defines this custody dispute between an Indian mother and non-Indian third parties over an Indian child as a "child custody proceeding" involving "foster care placement". 25 USC §1903(1)(i) provides (emphasis added):

> For the purposes of this chapter, except as may be specifically provided otherwise, the term—
> (1) "child custody proceeding" shall mean and include—
> (i) **"foster care placement"** which **shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in** a foster home or institution or **the home of a guardian** or conservator **where the parent or Indian custodian cannot have the child returned upon demand,** but where parental rights have not been terminated[.]

Here, respondents being non-Indians, continued placement with them over Linda Davis' protest is a "foster care placement". *In re Custody of A.K.H.*, 502 NW2d 790, 793 (Minn App, 1993); *Matter of Guardianship of Ashley Elizabeth R.*, 116 NM 416; 863 P2d 451 (NM App, 1993), notwithstanding, to some extent (counting adoptive step-grandparents as part of an "extended family") the dispute is an intra-family one. *A.B.M. v. M.H.*, 651 P2d 1170, 1173-1176 (Alaska 1982), *cert denied*, 461 US 914; 103 S Ct 1893; 77 L Ed 2d 283 (1983); *In re Q.G.M.*, 808 P2d 684, 688 (Okla.1991); *In re Custody of A.K.H.*, 502 NW2d 790, 794-795 (Minn App 1993).

The Michigan Court of Appeals attempted to circumvent this federal statute by opining that, because there was already a limited guardianship in place, and because the placement with the Joneses is not temporary, this case does not involve a "foster care placement." The ICWA is to be construed and applied in favor of Indians, *Bryan v Itasca Co, Minnesota, supra,* 426 US at 392[10], not, as the Michigan Court of Appeals has done, with a studied purpose to avoid the ICWA's mandates.

As the Pennsylvania appellate court, addressing the interplay between the definitional provision in 25 USC §1903(1)(i) and §1913(b) observed in *In re Adoption of K.L.R.F, supra,* 356 Pa Super at 562-563:

> We cannot help but notice that these two provisions are contradictory; one provides that consent can be withdrawn at any time with regard to a foster care placement; and the other just as explicitly states that in a foster care placement, the parent or Indian custodian cannot have the child returned upon demand. We need not resolve this inconsistency in the case before us. However, we note that if §1903 is in fact what the legislature intended the definition of "foster care placement" to be, then § 1913(b) can be given no effect because a foster care placement by definition precludes the

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[10] "[W] e must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 655 n. 7, 96 S.Ct. 1793, 1797, 48 L.Ed.2d 274 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918). See *Choate v. Trapp,* 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912); *Antoine v. Washington,* 420 U.S. 194, 199-200, 95 S.Ct. 944, 948-949, 43 L.Ed.2d 129 (1975)." (Emphasis supplied.)

possibility of a parent being entitled to the return of the child upon demand. * * *

We construe § 1913(b) as applying to situations such as the instant case, wherein a *consensual* foster care placement was made in the first place and there is no inherent bar to a withdrawal of the consent. In so doing, we are guided by the presumption that the drafters of the statute did not intend a result that is absurd or impossible of execution, *McKinney v. Board of Commissioners of Allegheny County,* 488 Pa. 86, 410 A.2d 1238 (1980); and the presumption that the drafters did intend the entire statute to be effective and certain. *In re Borough of Lemoyne,* 176 Pa.Super. 38, 107 A.2d 149 (1954). Further, statutes enacted to benefit American Indians must be liberally construed with all doubts resolved in favor of the Indian seeking its benefits or protections. *Preston v. Heckler,* 734 F.2d 1359 (9th Cir.1984); *Bryan v. Itasca Co., Minnesota,* 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). With these principles in mind, we cannot conclude that the drafters of the Act intended § 1903(1)(i) and § 1913(b) to interact in such a way as to nullify the withdrawal of consent provision in § 1913(b). Therefore, we hold that the definitional language in § 1903(1)(i) has no effect upon an Indian parent's ability to demand a return of the child pursuant to § 1913(b).

In the present case, likewise, respondents were understood from the outset to have only temporary custody, so there is no tension between the statutory sections.

The Michigan Court of Appeals thus baldly but erroneously asserted in Part I, Footnote 6 of its opinion (Pet. Apx. 13a) that because Jewel was already in the temporary custody of the Joneses, this was not a "foster care

placement" proceeding as defined in §1903(1)(i) and thus that the ICWA simply has no application. Again, citing no authority to support its creation of an enormous loophole in the coverage of the ICWA[11], the Michigan Court of Appeals has gone out of its way to deny Linda Davis and her daughter Jewel, enrolled members of the Chippewa Tribe, the Congressionally-mandated protective benefits of the ICWA, which is the antithesis of the Michigan judiciary's duty toward an Indian parent. Since this dispute concerns the continued placement of Jewel with her limited guardians, **it also comes within the mandate of 25 USC §§1911(b) and 1912(a)** that preclude adjudication of a custody petition without either ceding jurisdiction to the Tribe or at least notifying the tribe of the proceedings. *In re Custody of AKH, supra,* 502 NW2d at 792-793[12]. In other cases

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[11] Following the Michigan Court of Appeals' opinion, to circumvent the ICWA one need only induce an Indian parent, by whatever means, to initially consent to a limited guardianship; then, whatever happens thereafter (including, as here, the Indian parent futilely demanding return of the child per §1913(b)), the ICWA is deemed inapposite. It is just such a narrow construction of the protective ambit of the ICWA that this Court refused to entertain as conceivably consistent with Congressional intent in *Mississippi Bank of Choctaw Indians v Holyfield, supra,* 490 US at 46 n. 20:

> FN20. Nor is it inconceivable that a State might apply its law of domicile in such a manner as to render inapplicable § 1911(a) even to a child who had lived several years on the reservation but was removed from it for the purpose of adoption. Even in the less extreme case, a state- law definition of domicile would likely spur the development of an adoption brokerage business. Indian children, whose parents consented (with or without financial inducement) to give them up, could be transported for adoption to States like Mississippi where the law of domicile permitted the proceedings to take place in state court.

[12] There, the Indian child had been in her *Indian* grandmother's custody when the grandmother sought sole legal and physical custody; the Minnesota Court of Appeals concluded that the definition of "foster care placement" in 25 USC §1903(1)(i) was intended to apply even to an intra-*Indian* family dispute (here, respondents are not Indians, while Linda

even the Michigan Court of Appeals has recognized the compulsion of the ICWA that no infringement of parental custodial rights *vis à vis* an Indian child is valid unless the tribe has first been properly notified. *Matter of Claybron* (Mich App No. 247223, Nov. 20, 2003).

The ICWA must be complied with in any Indian child custody proceedings. *Matter of K.A.B.E.*, 325 NW2d 840, 842 (SD, 1982). The sole exception is where applicable state law provides *greater* protection to the Indian family unit. 25 USC §1921[13]. The ICWA is to be strictly construed and applied in **favor of Indians**. *Mississippi Choctaw Indians v Holyfield, supra,* 490 US at 50-51. *Bryan v Itasca Co, Minnesota, supra,* 426 US at 392.

A. The Michigan judiciary erred in failing to immediately restore full physical and legal custody to Linda Davis when, prior to and during trial, petitioner Linda Davis, an Indian mother, expressed her desire to terminate the limited guardianship and regain full physical and legal custody of Jewel Beveridge, her Indian child.

Initially, Linda Davis voluntarily agreed to allow Carolyn and Richard Jones to become limited guardians of Jewel[14]. Even if it was somehow not clear from petitioner's

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Davis and Jewel Beveridge *are* Indians), and thus, on remand, with the tribe participating, the trial court was to accord the Indian parents and the tribe the protective benefit of the ICWA in defending the proceeding.

[13] 25 USC §1921 provides:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

[14] Nonetheless, there is no judicial certification that the terms and consequences of that consent were fully explained to Linda Davis in detail and fully understood by her, thus rendering even the apparently

Dec. 11, 2000 and May 11, 2001 motions to regain custody (Pet. Apx. 53a and 55a),[15] petitioner's trial testimony that she wished to have her full custody rights restored (Pet. Apx. 99a) should have immediately ended the proceedings pursuant to 25 USC §1913(b) (emphasis added):

> (b) Foster care placement; withdrawal of consent
> **Any parent or Indian custodian may withdraw consent to a foster care placement under State law *at any time* and, upon such withdrawal, the child *shall be returned* to the parent or Indian custodian.**

This federal statute is unambiguous, and means exactly what it says. *In re Adoption of K.L.R.F., supra,* 356 Pa Super at 563; *Matter of Appeal in Pima County Juvenile Action No. S-903, supra,* 130 Ariz at 207; 635 P2d at 192.

Appeal to the Michigan Court of Appeals and Michigan Supreme Court was one way for Linda Davis to insist that her rights under the ICWA be honored per 25 USC §1914 :

> Any Indian child who is the subject of any action for foster care placement * * * under State law, **any parent or Indian custodian from whose custody**

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consensual initial establishment of the limited guardianship invalid under 25 USC §1913(a), which provides (emphasis supplied):

> a) Consent; record; certification matters; invalid consents
> **Where any parent or Indian custodian voluntarily consents to a foster care placement * * *, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. * * *.**

[15] Thus, the Michigan court's assertion that petitioner made no effort to terminate the limited guardianship prior to the filing of her circuit court motion simply willfully ignores the unimpeachable documentary record (Pet. Apx. 53a-54a).

such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

The Michigan appellate courts, as part of the state's "one court of justice", Mich Const 1963, art 6, §1, are courts of competent jurisdiction for this purpose, Const 1963, art 6, §§1 and 4; Mich Comp Laws §§600.217, 600.219; Mich Court Rules 7.301(A)(6) and (7) and 7.316(A)(7), and Linda Davis had proper standing to invoke the ICWA on appeal to enforce her rights thereunder. *In re Kreft*, 148 Mich App 682, 687-689; 384 NW2d 843 (1986).

From and after December 11, 2000, when petitioner first invoked her rights under 25 USC §1913(b), respondents had unclean hands, which should have closed the circuit court's doors to their petition. *Precision Instrument Mfg Co v Automotive Maintenance Machinery Co*, 324 US 806, 814; 65 S Ct 993, 89 L Ed 1381 (1945). Equity respects the principle that the party that is first in time is first in right, *Judson v. Corcoran*, 17 How (58 US) 612, 614; 15 L Ed 231 (1854); *Salem Trust Co v Manufacturers' Finance Co*, 264 US 182, 192-193; 44 S Ct 266; 68 L Ed 628, 31 ALR 867 (1924). Here, the Joneses, pursuant to 25 USC §1913(b), were legally bound to return Jewel from and after December 11, 2000; the Michigan judiciary should have dismissed respondent's custody request and also have recognized that this established Linda Davis' superior equitable rights as first in time.

Note that even if the requirements for state interference with custody of this Indian child had been otherwise fulfilled, it would still violate the ICWA to grant custody to respondents, who are non-Indians, where qualified Indians, *e.g.* Rebecca Davis (petitioner's adult daughter), are available to accept that responsibility. 25 USC §1915(b). To that end,

the circuit court would also have had to investigate the prevailing social and cultural standards of the Saginaw Chippewa Indian Tribe. 25 USC §1915(d) and (e)[16].

B. The circuit court acted without jurisdiction in violation of 25 USC §1920 by conducting a custody proceeding where the limited guardians retained custody of the Indian child after the Indian mother had expressed a desire to regain her custodial rights.

In what may be denominated the ICWA's "clean hands" provision, Congress has decreed that no person in the position of respondents may even be heard to argue for custody where they have refused to restore an Indian child to its Indian parent upon request. 25 USC §1920 provides (emphasis added):

> **Where any petitioner in an Indian child custody proceeding before a State court** has improperly removed the child from custody of the parent or Indian custodian or **has improperly retained custody after a** visit or other **temporary relinquishment of custody, the court *shall decline jurisdiction*** over

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[16] Those subsections of 25 USC §1915 provide:

> (d) Social and cultural standards applicable
> The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.
>
> (e) Record of placement; availability
> A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

> **such petition and *shall forthwith return the child to his* parent or *Indian custodian* unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.**

Again, the Michigan judiciary simply ignored this federal statutory directive, obviously having no satisfactory answer to the federal mandate, but being determined to act according to the dictates of what they regarded as their unfettered discretion, as though this case involved a non-Indian child and non-Indian parent.

Note that the circuit court did not purport to find that returning Jewel to the custody of Linda Davis would "subject the child to a substantial and immediate danger or threat of such danger." To the contrary, the circuit court allowed Linda Davis unsupervised parenting time every Thursday through Sunday, alternate holidays, and two weeks in the summer (Pet. Apx. 22a); that is wholly inconsistent with any intimation that restoring full physical and legal custody to Linda Davis would expose Jewel to "substantial and immediate danger" per 25 USC §1920.

The circuit court found only that, using the state-law "best interest" factors of Mich Comp Laws §722.23(a)-(*l*), the Joneses are the better choice to have custody of Jewel. But that is irrelevant; Congress has determined that such relativistic comparisons, while perhaps suitable in ordinary custody disputes, are not allowed because they threaten Indian culture and the continued existence and integrity of Indian tribes. 25 USC §1901(3)-(5)[17]. Congress accordingly

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[17] 25 USC §1901 provides (emphasis supplied):

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

established a federal standard requiring proof surmounting the statutory threshold and satisfying the "beyond a reasonable doubt" standard, 25 USC §1912(f)—a standard to which the circuit court never adverted[18].

C. The circuit court erred in failing to require the limited guardians to notify the Saginaw Chippewa Indian Tribe of this foster care placement proceeding and of the Tribe's right to intervene, and that omission created a jurisdictional defect in all further proceedings.

25 USC §1912(a) provides (emphasis supplied):

(a) Notice; time for commencement of proceedings; additional time for preparation
In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian

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(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

[18] Even if 25 USC §1912(f) does not apply, 25 USC §1912(e) requires proof by clear and convincing evidence to bring into play any of the federal exceptions.

> child is involved, the party seeking the foster care placement of * * * an Indian child **shall notify the** parent or Indian custodian and the **Indian child's tribe,** by registered mail with return receipt requested, **of the pending proceedings** and of their right of intervention. * * * **No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice** by the parent or Indian custodian **and the tribe or the Secretary** * * *.

In this respect the Indian Child Welfare Act is jurisdictional and failure to give adequate notice to tribes divests state courts of jurisdiction to terminate parental rights. *In Interest of J.W., supra,* 498 NW2d at 419; *Interest of HD,* 11 Kan App 2d 531, 538-539; 729 P2d 1234, 1241 (1986); *Matter of N.A.H.,* 418 NW2d 310, 311 (SD, 1988); *In re Junious M,* 193 Cal Rptr 40; 144 Cal App 3d 786, 792 ff (1983). *See also* 25 USC §1914.

One reason for this rigid application of the notice requirement is that, without tribal participation, a court considering a custody dispute tends to get its most important information from state agencies. The deficiency of the resulting adjudication then follows for the reasons identified in *In re Custody of A.K.H., supra,* 502 NW2d at 795:

> While a home study could be done by the county social services department, many social workers are ignorant of Indian cultural values and social norms in judging the fitness of a particular family, and therefore make decisions wholly inappropriate in the context of Indian family life. H.R.Rep. No. 95-1386, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532. Contributing to this problem has been the failure of state agencies to take into account the special problems and circumstances of Indian families. *Id.* at 7541. Non-Indian social workers

> cannot reasonably be expected to evaluate a proposed custodian from Indian cultural perspectives, and therefore input from the Indian tribe is desirable when a state court makes a custody decision involving Indian children.

The ICWA requires notice whenever a state court has reason to believe that a child is an Indian child. *In re Kahlen W*, 285 Cal Rptr 507; 233 Cal App 3d 1414, 1422 (1991).

The Federal Bureau of Indian Affairs has issued "Guidelines for State Courts; Indian Child Custody Proceedings," covering the notice obligation, among other ICWA issues. 44 Fed Reg 67,584 *et seq.* (Nov. 26, 1979). The Guidelines set forth five circumstances where the Bureau of Indian Affairs concludes that a state court "has reason to believe a child involved in a child custody proceeding is an Indian": (1) where the court is directly informed the child is an Indian child; (2) where a public or licensed private agency has information which suggests that the child is an Indian; (3) where the child states that he or she is an Indian; (4) where the residence or domicile of the child, his or her biological parents or an Indian custodian is known or shown to be a "predominantly Indian community"; and (5) where an officer of the court has knowledge that the child may be an Indian child. Guideline B.1.(c)(i)-(v), 44 Fed Reg 67586 (Nov. 26, 1979). The list is intended to be non-inclusive. The commentary to the Guidelines states that "the best source of information on whether a particular child is Indian is the tribe itself." Commentary to Guideline B.1. It further notes that list of circumstances "is not intended to be complete, but it does list the most common circumstances." *Id.*

Here, the Tribe recognizes the mother and child as Indians, asserting criminal jurisdiction over the mother for off-reservation conduct, and providing stipends to both mother and child, as well as making health care coverage

available to them. Additionally, counsel for the Joneses acknowledged the Indian status of mother and child at trial (TR 4/22/02, p. 158). It was therefore jurisdictional error to fail to issue the required notice the requisite period in advance of any hearing. *Matter of Claybron* and §1914, *supra*.

D. The Michigan courts erred in failing to require respondents to introduce qualified expert testimony to establish that active efforts had been made to avoid the breakup of an Indian family pursuant to 25 USC §1912(d).

The Michigan courts further erred in failing to require the limited guardians to introduce evidence that active efforts had been made to avoid a breakup of an Indian family. 25 USC §1912(d) provides:

> (d) Remedial services and rehabilitative programs; preventive measures
> Any party seeking to effect a foster care placement of * * * an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

No evidence of such *prerequisite* active efforts was adduced by the respondents. To the contrary, petitioner produced the Protective Services worker, Mr. Philburn, who testified that Linda fulfilled all the requirements of the parenting plan to which she agreed (TR 4/22/03, p. 235); **there was no contrary testimony**. Without such proofs, the circuit court erred in going forward with the hearings. *State ex rel Juvenile Dept of Multnomah County v Charles*, 70 Or App 10, 14-15; 688 P2d 1354, 1359 (1984), review allowed 298 Or 427; 693 P2d 48, review dismissed 299 Or 341; 701 P2d 1052.

Indeed, respondents would have had to produce experts possessing the special qualifications and specialized

knowledge of social or cultural aspects of Indian life to begin to meet their burden under this statute. 25 USC §1912(e); *In re Morgan*, 140 Mich App 594, 603 n. 3; 364 NW2d 754 (1985); *State ex rel Juvenile Dept of Multnomah County v Charles, supra*, 70 Or App at 17; 688 P2d at 1359-1360; *Matter of N.L.*, 754 P2d 863, 868 (Okla, 1988). A qualified expert must not merely testify as a witness, but must offer qualified expert testimony suggesting that custody with the Indian parent would be likely to result in serious emotional or physical damage to the child. *In re Interest of C.W.*, 239 Neb 817, 823-824; 479 NW2d 105, 111 (1992).

The guidelines for state courts promulgated by the Federal Bureau of Indian Affairs assist in defining a qualified expert witness. 44 Fed Reg 67,584, at 67,593 (1979).

> D.4 Qualified Expert Witnesses
> (a) Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.
> (b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings.
> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
> * * *

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

25 USC §1912(e) provides (emphasis added):

(e) Foster care placement orders; evidence; determination of damage to child
No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including **testimony of qualified expert witnesses,** that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Expert testimony is an absolute prerequisite to such a petition. *Matter of N.L., supra.*

II. The Michigan court erred in failing to accord Linda Davis' constitutional right as natural parent to make reasonable decisions as to the care and custody of her child appropriate weight and importance.

ISSUE PRESERVATION

This 14th Amendment (Pet. Apx. 97a) issue was raised by Linda Davis' at trial (Pet. Apx.. 63a-65a) and on appeal.

ANALYSIS

The Constitution reposes ordinary childrearing decisions to custodial natural parent(s); judicial intervention requires proof the parent's choices are harmful to the child. *Troxel v Granville,* 530 US 57, 66; 120 S Ct 2054; 147 L Ed 2d 49 (2000)

Such judicial intermeddling in the custody of a natural parent constitutes an unconstitutional interference with the fundamental liberty interest in childrearing, *Troxel v Granville, supra*. The mere fact that respondents, on a point by point comparison using state-law standards, might slightly outshine petitioner is simply inadequate to the task at hand. Respondents are interlopers; awarding third parties custody on a mere colorable showing they might do better parenting stands the constitutional order on its head. The circuit court never mentioned the applicable constitutional principle in its findings, and thus did not give it due weight.

As this Court recognized in *Troxel* (emphasis added):

> Accordingly, **so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family** to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. **The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters' best interests. . . . * * * In effect, the judge placed on [the mother], the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. . . . The decisional framework** employed by the Superior Court **directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child.** In that respect, **the court's presumption failed to provide any protection for [the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters. * * *** Needless to say, however, our world is far from perfect, and in it **the decision** whether such an

> intergenerational relationship would be **beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.**

Here, the trial court made no finding that Linda Davis is an unfit parent; it merely concluded that respondents might be somewhat better parents. And, as already noted in another context, the fact that the circuit court thought it appropriate to grant Linda Davis unsupervised custody of Jewel every Thursday through Sunday, alternate holidays, and two weeks in the summer, belies any possibility that Linda Davis could be deemed "unfit." The findings made are constitutionally insufficient to justify awarding custody to third parties over the natural parent's objections, and require restoration of petitioners' full custodial rights.

CONCLUSION

For the foregoing reasons, Linda Davis respectfully prays that her petition for certiorari be granted, or alternatively that pursuant to Supreme Court Rule 16.1 that the Court summarily reverse the lower court orders in this cause and direct that full *and unfettered* legal and physical custody of Jewel Beveridge be restored to Linda Davis **forthwith** as mandated by 25 USC §1913(b) *inter alia*.

Respectfully submitted

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Supreme Court
FILED
(2)
03-941 DEC 29 2003
OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

LINDA DAVIS, fka Linda Beveridge,
Petitioner

v.

RICHARD JONES AND CAROLYN JONES,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

APPENDIX IN SUPPORT OF

PETITION FOR WRIT OF CERTIORARI

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Order

Entered: July 24, 2003

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

123501

LINDA DAVIS, f/k/a
Linda Beveridge,
Plaintiff-Appellant,

and

RICHARD JONES and CAROLYN JONES,
Intervening Plaintiffs-Appellees,

v

TIMOTHY BEVERIDGE,
Defendant.

SC: 123501
COA: 242299
Iosco CC: 99-002099-DM

/

On order of the Court, the application for leave to appeal from the January 24, 2003 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh and Kelly, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 24, 2003 /s/ Inger Z. Mayer
Deputy Clerk

Order

Entered: July 24, 2003

123501 (58)

LINDA DAVIS, f/k/a
Linda Beveridge,
Plaintiff-Appellant,

and

RICHARD JONES and CAROLYN JONES,
Intervening Plaintiffs-Appellees,

v

TIMOTHY BEVERIDGE,
Defendant.

_____/

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 123501
COA: 242299
Iosco CC: 99-002099-DM

On order of the Court, the motion for reconsideration of this Court's order of July 24, 2003 is considered, and it is DENIED because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 31, 2003 /s/ Corbin R. Davis
Clerk

Michigan Court of Appeals' Opinion **Appendix C**

STATE OF MICHIGAN
COURT OF APPEALS

LINDA DAVIS,
Plaintiff-Appellant,

and

RICHARD JONES and CAROLYN JONES,
Intervening Plaintiffs-Appellees,

v

Court
TIMOTHY BEVERIDGE,
002099-DM
Defendant.

UNPUBLISHED
January 24, 2003

No. 242299
Iosco Circuit

LC No. 99-

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff, the mother of Jewel Beveridge[1], contends that the circuit court's failure to comply with the notice provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, deprived the court of jurisdiction to award custody of Jewel to Carolyn and Richard Jones, Jewel's paternal grandmother and step-grandfather. Plaintiff also contends that the trial committed several errors that resulted in the erroneous decision to award custody of Jewel to the Joneses. We affirm.

---

[1] Jewel's date of birth is August 6, 1998.

Basic Facts and Procedural History

Plaintiff filed a complaint for divorce from defendant in September 1999. Plaintiff and defendant are the biological parents of Jewel Beveridge. In November 1999 plaintiff and defendant consented to the appointment of the Joneses as Jewel's limited guardians.[2] A judgment of divorce dated May 10, 2000, awarded temporary custody of Jewel to the Joneses "pending further order of the Court."

On April 12, 2001, the Joneses filed a "Motion to Modify Judgment and Request for Friend of the Court Investigation and Report." The motion cited the following pertinent allegations in support of the Joneses' request for custody:

> 1. The petitioners received third party custody of the minor child through the divorce judgment filed in the case on 10 May 2000.
>
> 2. The plaintiff mother was awarded reasonable visitation with minor child.

---

[2] There is no evidence in the record that plaintiff revoked her consent to the limited guardianship. Although there is no formal requirement for a revocation of consent to foster care placement, the Bureau of Indian Affairs guidelines require the parent or Indian custodian to file a formal revocation of consent with the court where the consent form was filed. BIA Guidelines, E.3, at 67594. Further, there is no evidence to support a finding that plaintiff sought to revoke consent to the limited guardianship by demanding return of the child before the Joneses were awarded custody in the judgment of divorce. Rather, the record reveals that plaintiff simply filed a motion for custody in the divorce action in response to the Joneses' motion for custody.

3. The defendant father was awarded supervised visitation with the minor child.

4. The parents had submitted to a limited guardianship with the Iosco County Probate Court.

5. As of the drafting of this motion, the parents have not complied with the parenting plan.

6. The minor child has resided with the third party grandparents since 1999, which represents most of the child's life.

7. The parent's [sic] of the minor child had limited visitation since the commencement of the limited guardianship in [sic] 29 November of 1999.

8. The third party custodians are concerned for the safety of the minor child, if custody were returned to the parents.

9. A Friend of the Court Report and Recommendation for the minor would be appropriate.

In an order dated May 10, 2001, the trial court ordered that custody of the child remain with the Joneses pending psychological evaluations on all parties seeking custody and a Friend of the Court investigation, report, and recommendation regarding custody. On May 11, 2001, plaintiff filed a "Motion to Modify Judgment of Divorce Re: Child Custody" in which she sought sole legal and physical custody of the child.

At a pretrial hearing on February 15, 2002, the following colloquy occurred:

> [Plaintiff's Counsel]: There is a legal issue we want to raise. . . . It has to do with the Federal Indian Welfare Rights Act, which limits the Court's choices in placement of the child of Indian heritage, which we believe may not be being complied with right now.
>
> [Defense Counsel]: This is the first this issue has been brought up. It appears that Ms. Beveridge has—or Ms. Davis has, at all times, submitted to the jurisdiction of this Court.
>
> [Plaintiff's Counsel]: Don't disagree with either of those statements, Judge.
>
> * * *
>
> THE COURT: If you want to raise that issues, brief it, and schedule it for hearing.

There is no indication in the record that plaintiff complied with the court's verbal order to brief the issue or that the issue was again addressed in the trial court.

At the custody trial,[3] defendant Timothy Beveridge, Jewel's father, testified that plaintiff hit him in the head with a potted plant in the presence of plaintiff's daughter, Rebecca Davis, and other children. He also testified that plaintiff hit him "a couple times." Defendant further testified regarding an incident in which plaintiff stabbed him in the

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[3] Trial was held on April 22, April 26, and May 6, 2002.

arm with a knife in the presence of the children following an argument between himself and plaintiff. Defendant opined, however, that plaintiff had close ties with Jewel and that plaintiff was "capable of raising her right now."

Vicki Beveridge, defendant's stepmother, testified that she observed Jewel with the Joneses and that they had a "very warm and loving home" and that Jewel was "very, very bonded to them." Vicki also said that she was aware of Jewel's asthma. She indicated that the asthma attacks she saw Jewel suffer usually occurred within twenty-four hours of Jewel returning from being at defendant or plaintiff's home. Vicki described the Joneses' household as very comfortable and clean, "but lived in" with it being "evident that a child lives there" with "toys and thing around." She said that Jewel had her own room that was very nice and clean and that Jewel had a lot of toys. Vicki also testified that, on August 6, 2000, Jewel's second birthday, plaintiff was at the Joneses' home and plaintiff said, "Yeah, I use marijuana, so what, a lot of people do. A lot of people use it to help them to calm down. It is beneficial."

Carolyn Jones testified that Jewel had lived in her home since July 1999. She said that she and her husband take care of Jewel and that Jewel has her own room. Carolyn also testified that she registered Jewel in Head Start, which Jewel was attending four mornings of the week. She also enrolled Jewel in a swimming class. Carolyn said that there was no drug or alcohol use in her house and that she and her husband did not smoke. She also said that neither of them had any domestic violence in their home. Carolyn indicated that, from August 2001 to the time of her testimony, of eighty days when plaintiff was supposed to have visitation time with Jewel, plaintiff only exercised thirty-nine days of

visitation. She calculated that, during the entire guardianship, plaintiff exercised thirty-five percent of her allotted visitation. When asked about reasons that plaintiff gave her for not picking up Jewel, Carolyn replied:

> I would have to say—there were many. I mean, there was [sic] times where she didn't show up and I'd ask her what happened. She was having a romantic interlude that weekend. She was getting a massage. She was going to aerobics. The most recent ones are that there was too—during Thanksgiving of last year—there was too much chaos in her house.

Carolyn also testified to the following observations of plaintiff at various times:

> She would have a very slurred voice, a very drawn out voice. There were occasions where she was not driving when she picked up Jewel. Her significant other or boyfriend would pick Jewel up along with [plaintiff] and [plaintiff] had very dilated eyes, very slurred speech. Admitted to me that she had done marijuana and was doing marijuana.

Carolyn described an incident that occurred probably three or four weeks before her testimony in which she smelled smoke on Jewel's clothing and backpack when she returned from plaintiff's home. Carolyn said that she was fifty-seven years old and that her husband was sixty-four. When asked by her counsel about their age, she said that she did not think "we're too old to handle this job" and that she felt they were in very good health. She also said that they got a lot of support from defendant's stepmother and father. Carolyn thought that they received $13,000 (presumably per year)

from the tribe for Jewel's care, but said that all that money was put in Jewel's trust fund and that they had "not spent a dime" of that money. They had not used any of it for Jewel's care.

Ted Stiger, Ph.D., testified that he evaluated plaintiff on May 29, 2001, Carolyn on August 27, 2001, and Richard Jones on September 4, 2001. He said that the results of plaintiff's evaluation "indicated a great deal of narcissism, self indulgence" and that she had "[i]ssues of being very prone to becoming dependant on others, in particular males." He indicated that plaintiff had "a great deal of accumulated anger and resentment" as well as suspiciousness and mistrust. Her test results were indicative of continued risk "in regard to acting out," meaning having "substance abuse difficulties, getting involved in enmeshed destructive relationships and things like that." With regard to Carolyn Jones, Dr. Stiger concluded that there were "indications of low self-esteem and indications of depressive affect" as well as "a proclivity to become overly dependent on males." However, Dr. Stiger said that Carolyn has a greater degree of emotional stability than plaintiff. Dr. Stiger testified that Richard showed "some indications of being overly passive with some low self-esteem indicators" and that there were "some indications of depressive effect," but no indications of any extreme or severe psychopathology in either of the Joneses. Dr. Stiger indicated that the Joneses did not present risk factors regarding potential abuse or neglect while plaintiff did.

Richard Jones testified that Jewel had resided in his and his wife Carolyn's home since July 1999 and that both he and Carolyn provided care for Jewel. Like Carolyn, Richard testified that Jewel had her own room, that there was no

drug or alcohol use in the home, and that he and Carolyn did not smoke. In short, Richard testified that he once asked plaintiff if she had smoked marijuana on an earlier occasion when he observed her eyes being dilated and her speech as slurred and that she said yes. Richard described a time when he picked Jewel up at plaintiff's house in which there had to be someone smoking there because cigarette smoke "just rolled out" when the door to the house was opened. Richard testified about an incident in which he asked plaintiff how she could go to court, put her hand on the Bible and swear to God to tell the truth, and then not tell the truth. He said that plaintiff said, "It[']s not my God."

Gloria Rouleau-Gerber, a mental health counselor, testified that she provided counseling to plaintiff and met Jewel, but that she had not met the Joneses. Rouleau-Gerber said that she observed plaintiff with her children and that plaintiff has "very strong mothering skills" and "very strong bonding attachment skills" with regard to her children. Rouleau-Gerber testified that, when plaintiff first came to her, she was "an adult child of an abusive history" who had a lot of defensiveness and anger and showed an inability to stand up for her own rights, but that plaintiff had "grown very strong and very capable of problem solving." Rouleau-Gerber indicated that she saw no abuse or neglect in the family of plaintiff and her four children and that she had no reservations about plaintiff becoming the sole custodian of Jewel.

Rebecca Davis, plaintiff's twenty-year-old daughter, testified that plaintiff raised her. Rebe cca graduated from high school, was taking college classes, and was employed in a "key carrier" management position with Rite-Aid. Rebecca indicated that she saw plaintiff with her younger siblings

and her own child "[a]ll the time" and that plaintiff cared for Rebecca's two year old son "usually every day, while I go to school at night, and then at night when I work when the day care is closed." Rebecca said that plaintiff taught her son a lot of things and that "he cries to go to her house when we go home." She also described plaintiff's relationship with Jewel as being the same as with the other children except Jewel is not around as much. On cross-examination, Rebecca essentially indicated that she saw plaintiff hit defendant with a pot, but that she did so in self-defense.

Plaintiff testified that she and Jewel are very close and indicated that, during the last two visitations when it was time to return Jewel to the Joneses, Jewel said that she did not want to go. In short, plaintiff indicated that she would use a "time out" as a means of discipline and that, when she was on friendly terms with the Joneses and was at their home, she "really didn't see much discipline." However, plaintiff said that one time Richard told her that he had taken his belt off and threatened Jewel that he would spank her. Although plaintiff did not believe he would really strike Jewel with a belt, she believed that "using that sort of disciplinary action is harmful." Plaintiff has five children, and each child has a different father. Plaintiff indicated that, while she used to smoke inside her house in her bedroom, she started smoking outside her house to avoid exposing her children to the smoke and that she does not allow anyone else to smoke in her house. Plaintiff acknowledged having smoked marijuana. Plaintiff indicated that defendant's arm was sliced by a knife when he tried to hit her while she had the knife in her hand. Plaintiff also indicated that she had violent and/or fearful altercations with "Mr. Forester," a man who she had dated and allowed to move into her home. Plaintiff essentially acknowledged being convicted of four

counts of fraud related to receiving money from her Indian tribe for caring for Jewel when Jewel was not living with her. On cross-examination, plaintiff testified that she did not deny having used marijuana since the limited guardianship was in place. She also testified that she was taken to a hospital by ambulance about five months prior to her testimony for a heroin overdose. She said that was the only time she ever used heroin. She obtained the heroin from "some people at the park" who were "downstate folks" she did not know. Plaintiff testified about an altercation with Forester in which both of them ended up with black eyes. She indicated that the incident in which she threw a plant at defendant involved him previously throwing water on her face, having her "pinned in the bathroom," and screaming at her.

I

Plaintiff first argues that the trial court lacked jurisdiction to decide this child custody dispute because it involved the Joneses seeking "foster care placement"[4] of Jewel and, therefore, that 25 USC 1912(a) required notice to Jewel's Indian tribe, the Saginaw Chippewa Indian Tribe.[5] 25 USC 1912(a), which is part of the ICWA, provides in pertinent part:

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[4] The ICWA only applies to child custody proceedings in state courts. The ICWA defines a "child custody proceeding" as one of the following: foster care placement, termination of parental rights, preadoptive placements, and adoptive placements. 25 USC 1903(1). This case clearly does not involve the latter three types of proceedings.

[5] Plaintiff's counsel first mentioned the issue of the ICWA at a February 15, 2002, pretrial hearing. The trial court directed plaintiff's counsel to brief the issue and file a motion if he wanted to raise the issue. However, no such motion was filed.

> In an involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right of intervention.

25 USC 1903(1)(i) defines a "foster care placement" for purposes of the ICWA to mean "any action *removing an Indian child from its parent* or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated" (emphasis added). This case does not involve removal of an Indian child from its parent. Here, the Joneses already had custody of the child at the time they filed their motion to modify the judgment of divorce, pursuant to both the limited guardianship and the judgment of divorce. Therefore, this case does not involve a foster care placement proceeding as that term is defined in the act. Because the lower court proceeding was not a "foster care placement" proceeding, it was not subject to the notice requirement of 25 USC 1912(a).[6]

II

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[6] Plaintiff's remaining arguments regarding the ICWA are premised on a finding that this case involves a foster care placement proceeding. In light of our conclusion that this case does not involve a foster care placement proceeding, the ICWA does not apply to this case. Thus, the remainder of plaintiff's arguments that are based on the ICWA need not be addressed.

Plaintiff argues that the award of custody of Jewel to the Joneses violated plaintiff's general constitutional right to custody of her child. Plaintiff's argument does not challenge the factual findings made by the trial court in its oral opinion expressing its decision to grant custody of Jewel to the Joneses, but rather essentially accepts those factual findings. Rather, plaintiff asserts that those findings were constitutionally insufficient to support awarding custody to the Joneses because the trial court did not find plaintiff to be an unfit parent.

In *Heltzel v Heltzel*, 248 Mich App 1, 27-28; 638 NW2d 123 (2001), this Court stated:

> We hold that, to properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's best interests, custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person. Only when such a clear and convincing showing is made should a trial court infringe the parent's fundamental constitutional rights by awarding custody of the parent's child to a third person.

This Court qualified this holding by noting that "it is not sufficient that the third person may have established by clear

and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him." *Heltzel, supra* at 28. Plaintiff cites the United States Supreme Court decision in *Troxel v Granville,* 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000), which specifically involved the constitutionality of a state statute that gave broad discretion to courts to order that third parties have visitation with children, in support of plaintiff's right to raise her child. However, in its more recent decision in *Heltzel,* this Court specifically discussed *Troxel,* and, thus, obviously considered its test for the burden that a third party must meet to prevail over a parent in a child custody dispute to be consistent with *Troxel. Heltzel, supra* at 21-23. Notably, while plaintiff cites *Heltzel,* she gives no consideration to the key portion of *Heltzel* that sets forth the amplified clear and convincing standard applicable in this context.

In its oral opinion explaining its decision to grant custody of Jewel to the Joneses, the trial court stated that, "[i]n order for custody to be granted to the limited guardians, the factors must clearly and collectively and convincingly establish that it is in the child's best interest." The trial court likewise stated, "[t]he burden of proof on [the Joneses] is clear and convincing." After a discussion related to the statutory best interest factors, the trial court expressed its "overwhelming opinion" that it was in Jewel's best interest for custody to be granted to he Joneses. The trial court's remarks reflect that it recognized and applied the proper burden of proof in requiring the Joneses to prove by clear and convincing evidence that granting custody of Jewel to them was in her best interests. The trial court did not expressly state that the Joneses showed more than a "marginal" benefit, but it is manifest from the trial court's analysis, including its statement that its "overwhelming

opinion" favored the Joneses, that it found far more than a marginal benefit to Jewel from awarding custody to the Joneses. In this regard, court found every best interest factor to favor the Joneses. Notably, the trial court referred to evidence that drug and alcohol abuse by plaintiff was prevalent and included a hospitalization for a heroin overdose. The trial court stated that plaintiff subjected herself to great risk of harm with her substance abuse including "purchasing of heroine [sic] from a park from an unknown person to her." Accordingly, we conclude that the trial court's analysis and the factual findings in support of that analysis were appropriate to allow awarding custody of Jewel to the Joneses without violating the general constitutional right of a parent to custody of a child as against third parties.[7]

III

Plaintiff maintains that the Joneses lacked standing to seek custody under MCL 722.26b(2) because plaintiff achieved substantial compliance with the limited guardianship plan shortly before trial commenced on April 22, 2002.[8] MCL 722.26b(2) provides:

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[7] Contrary to the possible implication of plaintiff's argument, it is not constitutionally required for a third party to show a parent to be unfit in order to prevail in a child custody dispute. The *Heltzel* panel indicated that the amplified clear and convincing evidence standard discussed above should be applied on remand in that case, which involved a "fit natural mother seeking a change of her child's custody from an established custodial environment with third persons." *Heltzel, supra* at 23-24. Thus, it is inherent in the analysis in *Heltzel* that a third party may, in appropriate circumstances, be awarded custody over even a *fit* parent without violating the parent's general constitutional right to custody of a child.

[8] We note that the Joneses also had custody of the child pursuant to the May 10, 2001, judgment of divorce.

> A limited guardian of a child does not have standing *to bring* an action for custody of the child if the parent or parents of the child have substantially complied with a limited guardianship placement plan regarding the child entered into as required by [MCL 700.5205], or section 424a of former 1978 PA 642. [Emphasis added.]

MCL 722.26b(2) is directed to the circumstances that exist when a motion for custody is filed by a limited guardian because it provides that a limited guardian does not have standing "to bring" an action for custody if the parent or parents have substantially complied with a limited guardianship placement plan. Plaintiff does not argue that she was in substantial compliance with the limited guardianship placement plan when the Joneses brought their action for custody by filing a motion for custody of Jewel on April 12, 2001. Thus, assuming that plaintiff s ubstantially complied with the limited guardianship placement plan shortly before trial, plaintiff has not shown that MCL 722.26b(2) barred the Joneses from bringing their motion for custody because the substantial compliance occurred after the action for custody was brought. In this regard, nothing in the language of MCL 722.26b(2) indicates that, after a limited guardian with standing to bring an action for custody has done so, that standing to continue to pursue the action is lost if a parent subsequently achieves substantial compliance with a limited guardianship because "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

IV

While plaintiff's argument might be clearer, it appears that plaintiff is asserting that it was improper for the trial judge acting in this case to consider evidence such as non-transcribed testimony and exhibits presented in the probate court guardianship proceedings involving Jewel.[9] We disagree.

MCL 722.26b(5) provides:

> If a child's guardian or limited guardian brings a child custody action, the circuit court shall request the supreme court in accordance with [MCL 600.225] to assign the probate court judge who appointed that guardian or limited guardian to serve as the circuit court judge and hear the child custody action.

The most plausible explanation for this statutory provision is that the Legislature wished to have the probate judge who presided over guardianship proceedings involving a child also preside over a claim for custody of that child brought by a guardian or limited guardian so that the trial judge could consider evidence presented and impressions formed by the probate judge in the guardianship proceedings. Presumably, the Legislature would not have enacted such a statutory provision if it intended for a child custody action brought by a guardian or limited guardian to be considered by a circuit judge without regard to evidence presented to and

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[9] The trial judge in this case is a probate judge who presided at earlier probate court guardianship proceedings related to Jewel and who was assigned to act as a circuit judge in the present case.

impressions formed by the presiding judge during earlier guardianship proceedings. Thus, we conclude that the trial judge could properly consider evidence presented and impressions that he formed at the prior guardianship proceedings.[10]

With regard to plaintiff's due process argument, she seems to be indicating that she was not able to appropriately respond to evidence presented at the guardianship proceedings. Due process in civil cases requires that a party have the chance to know and respond to the evidence. *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). However, from all indications, plaintiff was able to participate in the guardianship proceedings and know the evidence that was presented there. With regard to appellate review by this Court, there appears to be no reason that plaintiff could not have ordered and provided to this Court transcripts of the guardianship proceedings if she concluded that it would have been helpful to her appeal to do so. Thus, we conclude that plaintiff's due process rights were not violated by the trial court's consideration of evidence presented during the guardianship proceedings.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

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[10] Notably, the parties do not address MCL 722.26b(5) in discussing this issue.

Michigan Court of Appeals' Order 3/4/2003 **Appendix D**

Court of Appeals, State of Michigan

ORDER

Linda Davis v Timothy Beveridge
Docket No. 242299
LC No. 99-002099 DM

Christopher M. Murray
Presiding Judge
David H. Sawyer
E. Thomas Fitzgerald
Judges

The Court orders that the motion for rehearing is DENIED.

/s/ Christopher M. Murray
Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

March 4, 2003 /s/ Sandra Schultz Mengel
Date Chief Clerk

Iosco (Michigan) Circuit Court Order 6/7/2002 **Appendix E**

STATE OF MICHIGAN

CIRCUIT COURT-FAMILY DIVISION
FOR THE COUNTY OF IOSCO

Linda Davis (Beveridge),
Plaintiff

V.

Timothy Beveridge,
Defendant.

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Carolyn Jones
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ORDER FOR CUSTODY, PARENTING TIME AND SUPPORT

AT A SESSION of said court held in Iosco County Tawas City, Michigan, on the 7 Day of June, 2002

PRESENT: Honorable John D. Hamilton
Circuit- Family Court Judge

IT IS FOUND:

It is in the best interest of the minor child to grant physical custody to the third party limited guardians Richard and Caroyn Jones.

PROVISION FOR MINOR CHILD

IT IS HEREBY ORDERED AND ADJUDGED that the following provisions are made regarding the minor child of the parties.

CUSTODY OF MINOR CHILD

The third party limited guardians Richard Jones and Carolyn Jones shall have physical custody of the minor child of the parties, to wit, Jewel Beveridge, d.o.b. 08/06/98, or until further order of this court.

PARENTING TIME

The plaintiff shall have reasonable parenting time with the minor child of the parties. Paenting time shall begin at 600 p.m. on Thursday and end at 6:00 pm. on Sunday. Reasonable parenting time shall be defined as alternating weekends, alternating holidays, and extended 2 weeks in the summer, or as otherwise agreed to by the parties.

The Defendant shall have supervised parenting time with the minor child of the parties for 2 hours per week. The supervisor must be approved in advance by the Friend of the Court.

Iosco (Michigan) Circuit Court Order 6/7/2002 **Appendix E**

CHILD SUPPORT

The Plaintiff Linda (Beveridge) Davis shall pay child supports weekly', through the offices the Iosco County friend of the Court in the amount of$ 117.00 per week for one minor child until further order of this Court The Defendant, Timothy Beveridge shall pay child support weekly through the offices of the Iosco County Friend of the Court in the amount of $73.00 per week for one minor child until further order of this Court. Said support shall continue until the child reaches the age of eighteen (18) or graduates from high school, whichever is later, but in no case after the child reaches nineteen and one half (19½) years of age provided the child is regularly attending high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate high school, and is residing on a full time basis with the custodial parent or at an institution. If current support is reduced by this provision, the total payments shall not be reduced as long as any arrearage in child support exists.

PRESERVATION OF ARREAGE

Any and all arrearage accumulated as a result of Plaintiff or Defendants failure according to a temporary support order issued shall be preserved.

DOMICILE OF CHILDREN

The legal custodians of the minor child, shall immediately inform the Iosco County Friend of the Court of any change in address, The said minor child is presently residing at 6825 Roanoak, Oscoda, MI 48750. The residence of the minor child shall not be removed from the State of Michigan without prior approval of the court

LEGAL RESIDENCE OF THE CHILD

The court further orders that pursuant to 2000 PA 422, effective 1/9/01, a child whose parents have joint legal custody pursuant to a court order, shall not change the legal residence of the child more than 100 miles from the child's current custodial residence except in compliance with Section 11 of the Child Custody Act of 1970, 1970 PA 91, MCL 722.31.

REQUIRED NOTIFICATIONS

Plaintiff, Defendant and Custodians shall. notify the Office of the Friend of the Court and the other party of any changes of residential and or mailing address and telephone numbers while the order of support in operative, within 21 days of such change, Each party obligated to contribute to the support of a minor child shall keep the Office of the Friend of the Court informed of the following:

a. The name and address and telephone number of the payer's and payee's current sources of income. "Source of income" means an employer or successor employer or any other individual or entity that owes or will owe income to the payer.

b. Any health care that is available to either party as a benefit of employment or that is maintained by him or her, the name of the insurance company, nonprofit health care corporation or health maintenance organization; the policy, certificate or contract number; and the names and birth dates of the persons for whose benefit he or she maintains health care coverage under the policy, certificate or contract.

c. Each party shall notify the Friend of the Court of any changes in his or her current source of income or health care benefits as specified by sub-paragraphs A and B.

d. Each party shall notify the Office of the Friend of the Court if they hold occupational licenses, driver's license and social security number and supplya copy of each while the order of support is operative. The requirement of provide a social security number is subject to exceptions outlined in MCL 552.603 Sec. 3 (6) (f).

CHILD SUPPORT ARREARA GE

The amount of past due support that accrues under a support order issued in this state or under the law of another state constitutes a lien in favor of the recipient of support against the real and personal property of payer, other than financial assets pledged to a financial institution as collateral or financial assets to which a financial institution has a prior right of set off or other lien. The lien is effective at the time that the support is due and unpaid and shall continue until the amount of past due support is paid in full or the lien is terminated by the support enforcement agency. (MCL 552.625.a) The payer's real and personal property can be encumbered or seized if an arrearage accrues in an amount greater than the amount of periodic support payments payable for 1 year under the support order. (MCL 552.603).

FUTURE MODIFICATION OF SUPPORT

Except as otherwise provided in section 3 of the support and visitation enforcement act, Act No. 295 of the Public Acts of 1982, being section 522.603 in the Michigan Compiled

Laws, a support order that is part of a judgment or is an order in a domestic relations matter as that term is defined in section 31 of the Friend of the Court Act, Act No. 294 of the Public Acts of 1982, being section 552.531 of the Michigan Compiled laws, is a judgment of this state, and is not, on and after the date it is due, subject to retroactive modification.

CHILD SUPPORT ABATEMENT FOR PARENTING TIME

The payer of support shall receive a fifty percent (50%) during any period of time when the minor child(ren) spends six (6) or more consecutive overnights with the payer of support. The abatement shall be calculated on a per diem basis. The payer shall notify the Office of the Friend of the Court in writing within 14 days following the occurrence of such parenting time. Failure to notify be office in writing within the time provided shall be a waiver of such credit except as otherwise stipulated to by the parties.

OVERSIGHT

The Plaintiff shall pay to the Iosco County Friend of the Court the sum Three and 25/100 ($3.25) per month in advance on each January 2nd and July 2nd when support payments are made through the Office of the Friend of the Court, as provided by statute

The Defendant shall pay to the Iosco County Friend of the Court the sum Three and 25/100 ($3.25) per month in advance on each January 2nd and July 2nd when support payments are made through the Office of the Friend of the Court, as provided by statute.

SURCHARGE

Commencing, January 1, 1996, on January 1 and July 1 of each year, thereafter, a fee calculated at an 8% annual rate, shall be added to the support payments that are past due as of those dates. The Friend of the Court shall apply monies received for support payments first to current support and then to any support arrearage owed, including any fees imposed, pursuant to this Order (PA 141. PA of 1995),

HEALTH INSURANCE

The Plaintiff and Defendant shall obtain or maintain any health care coverage that is available to them at a reasonable cost as a benefit of employment for the benefit of the child(ren). If a parent is self-employed and maintains health care coverage, the parent shall obtain or maintain dependent coverage for the benefit of the child(ren) if available at a reasonable cost. Uninsured medical expenses should be split between the parties on a pro-rata basis as follows: The Plaintiff shall pay 64% and the Defendant shall pay 36% of any uninsured Health care for the minor child(ren) until each child reaches the age 18 years and thereafter if support is payable under MCLA 552.16 a, MSA 25.96(1), as it may be amended,

A notice of an order for dependent health care coverage takes effect immediately and will be sent to the parent's current and subsequent employers and insurers if appropriate. The notice shall inform the parent that he or she may contest the action by requesting a review or hearing concerning the availability of health care coverage at a reasonable cost.

ORDER OF INCOME WITHHOLDING

Child support shall be paid by an order of income withholding pursuant to MCLA 552,604 et. seq. The Income Withholding Order shall take effect immediately unless or until a finding of good cause has been found by the Court in a formal hearing. If current support is reduced, the amount of income withholding shall not be reduced as long as an arrearage exists

EMPLOYMENT OF PAYOR

Whenever the party obligated to contribute to the support of a minor child in **the action**
(herein referred to as the payor) is not gainfully employed full-time, the payor shall diligently seek employment for both full and part-time unless payor has other income which meets the support obligation. Upon obtaining employment, the payer shall provide the Office of the Friend of the Court with the name, address, and phone number of the employer within three (3) days of his/her hire date

RETENTION OF JURISDICTION

This Court shall retain jurisdiction to interpret and enforce any and all terms and conditions of this Judgment of Divorce.

COUNSELING

All parties shall immediately engage in Family counseling, and the minor child shall begin counseling when the counselor considers it age appropriate.

Iosco (Michigan) Circuit Court Order 6/7/2002 **Appendix E**

The Plaintiff and Defendant shall begin psychiatric counseling immediately, they shall follow all treatment recommended by the psychiatrist and shall continue treatment until discharged by the psychiatrist.

The parties may request home surveillance or drug testing, if the fee is paid in advance.

EFFECTIVE DATE

This Order shall become effective immediately after it is signed and filed with the Clerk of this Court.

Dated: 6-7-02 /s/ Hon. John D. Hamilton (P28067)
Circuit-Family Court Judge

Approved as to Form:

Dated: 6-7-02 /s/ Charlene K. Baker
Iosco County Friend of the Court

STATE OF MICHIGAN

IN THE 23rd CIRCUIT COURT - FAMILY DIVISION

FOR THE COUNTY OF IOSCO

LINDA JEWEL DAVIS (f/k/a BEVERIDGE),
Plaintiff,
Vs. File: 99-2099-DM

TIMOTHY BEVERIDGE,
Defendant,
_____ _____/
Richard and Carolyn Jones,
Third Party Custodians
_____/

CUSTODY TRIAL -VOLUME III OF III
BEFORE THE HONORABLE JOHN D. HAMILTON
Tawas City, Michigan - Friday, May 6, 2002

APPEARANCES:

For the Plaintiff:	KELLER & MOIR Edward M.Keller (P15809) 1864 North US-23 East Tawas, MI 48730 (989) 362-9930
For the Defendant:	IN PRO PER
For the Third Parties:	James Bacarella (P46198) 1228 East US-23 East Tawas, MI 48730 (989) 362-1364
Recorded By:	Diane Knafla, CEO #6370 (989) 362-3497

Iosco Circuit Court Fact Findings 6/6/2002 **Appendix F**

Tawas City, Michigan
Friday, May 6, 2002 - 8:05 a.m.

EXCERPTS OF PAGES 52-67

* * *

(At 9:27 a.m. court recessed)

(At 10:11 a.m. court reconvened)

THE COURT: Okay. The Opinion on the Beveridge matter. Apologize to all of the parties for having to wait a few minutes. We had other matters scheduled. The matter regarding the custody of Jewel, excuse me, started in July

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of 1999 and Jewel was placed with Mr. and Mrs. Jones as a result of some of the parents problems. Subsequently, the parents had substantially greater problems and a formal limited guardianship was established November 23, 1999. Since that time, the child has remained at the Jones', with the exception of the court-ordered visitation.

Much has happened to the parties and the child since that time. Jewel has developed, and was diagnosed with, asthma. The parties have divorced. Tim remarried and is now separated. Linda has had several relationships and the FIA and police have been called and have had contact with the parties. The psychological exams of the parties have been completed. We have heard numerous witnesses, hours and hours of testimony, and pages and pages of exhibits.

The State of Michigan has several statues regarding the factual and legal proceedings that we are presented with

in this case. Statutes regarding whether the guardianships being established, the nature of those limited guardianships, the divorce statutes, and the latest custody statutes. The purpose of all of the related statutes are the care of the minor child or children who cannot take care of themselves. The court hearings on Jewel have been numerous. The parties have had numerous attorneys. Agreements have been made and goals and expectations have been. established, all with the expectation that Jewel would be returned to the custody of

one of her parents. The statutes indicate that there is a presumption to have custody with the parent or parents, unless a contrary conclusion is established by clear and convincing evidence. The parties to this action are the parents, separately, and the limited guardians, who are the moving parties. In order for custody to be granted to the limited guardians, the factors must clearly and collectively and convincingly establish that it is in the child's best interest.

Throughout this case, drugs, alcohol, violence, animals, asthma, psychological assessments, and counseling have been prevalent. The limited guardianship was not terminated, although it has been reviewed many times. The first review hearing being May 10, 2000, which was the same date as the parties divorce. That hearing was over the modification of the placement plan. Subsequently the asthma was diagnosed.

The parties made further stipulations July 13, 2000. Shortly after that, the police were called to a domestic disturbance with Tim and Angela, that being, I believe, July 15. &n August 10, 2000 that matter was again reviewed. Dr.

Stiger was ordered to perform counseling. Tim and Carolyn were to attend counseling. The animals were ordered out of the home. FIA was to do a home investigation. Tim was to get his alcohol problem under control.

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On August 29, 2000 FIA was involved with Linda's household. Mother was intoxicated and in the company of Duane Forester. The children were left unsupervised. That case was closed in April of 2000, as was indicated this morning.

During the December 11, 2000 review, specific findings were made that the parties had not substantially complied with the parenting time order. Specific goals and objections were established; drug and alcohol free homes, parents to do the breathing treatment, Tim to address counseling for alcohol and mother's relationship, and to complete Dr. Stiger's assessment. Mom was to address the marijuana use and alcohol.

At a March 12, 2001 review the parents were given expanded visitation, the Thursday thru Monday arrangement. Ms. Davis indicated that she was out of the Forester relationship and had a fresh start with Mr. Dan Dykes. But she further indicated that they were going to build a home and last recorded use of alcohol or controlled substances was in January.

I have thoroughly reviewed the files, exhibits, and the testimony of all of the witnesses, have been living with this case for along time. Since the start of the testimony in this immediate hearing, it has been on my mind greatly.

The testimony of Dan Dykes and daughter Rebecca was not given much weight because-of the inconsistency of prior

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statements in courts and documents and the testimony of Linda conflicting with theirs. Angela Beveridge testified as to Tim's disobeyment of the court orders, Tim's repeated intoxication and anger/aggression. Some of the intoxication was interfering with the planned activities with Jewel.. She also indicated that Tim was not to be left alone with their daughter and that he doesn't exercise his visitation with that daughter.

Gloria Cheeks-Rouleau-Gerber testified on behalf of Linda; and Linda, in her testimony, admitted that she had lied to her and therefore much of her testimony is discounted. However, it does show that Linda is attending counseling, has had years of abuse, and has been abusive to herself and that Ms. Gerber does agree with Stiger's assessments.

Dr. Stiger's reports are adopted as the most accurate assessment of the parties. Mr. Philburn testified that he discussed the start of the limited guardianship and the fact that the Jones' were, at that time, the best choice as caregivers. He closed his case and said that Linda cooperated with what he had suggested. Joe Filka testified that he has been working with Linda and Harvey in school problems of absenteeism and academics and that there has been improvement. Patricia Columbo testified that Ms. Davis contacted her in July of 2000 and has been attending domestic

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violence and support groups with her. The parties have testified at length and the Friend of the Court report has been admitted into evidence.

The burden of proof on the limited guardians is clear and convincing. The burden of proof between the parents is the preponderance of the evidence. Going thru the case factors; mother, dad, and grandparents Jones' testified as to the love and affection and other emotional ties existing between the parties involved and the child, that they all have a love for the child, and the Court does not doubt that. The parties scored equally on this.

The capacity, disposition of the parties involved to give the child the love, affection, and guidance and to continue the education in raising the child in his or her religion and creed, if any. Mother testified that she still exercised visitation and she does have rules at the home and that she currently isn't going to church. The father testified, and the now Mrs. testified against him, indicating that he has had poor visitation practices with the child, poor discipline with this child and also with other child-children in the household. Inappropriate disposition with Linda's children was also brought to the Court' attention.

The Jones' testified that they do have rules, they aren't attending the church. In a related matter, they do have the drawback that they are isolated from other family

members and the other drawback is that the grandparents are 57 and 64 at this time. However, I do look at the length of time the parties have been exercising that care and do weigh this factor in favor of the Jones'.

The capacity and disposition of the parties involved to provide the child with food, clothing, medical care and other material needs. As previously indicated, visitation has been a problem. The mother indicates that she has only done 40% of the visitation. She failed to attend some swimming classes, didn't call as she was expected for a medi-cal visit. The Court notes the close proximity of the parents' home to the grandparent's home. It is a matter of minutes between Lakewood Shores and the base. The numerous doctor's appointment were testified to that she was expected to be at and failed to appear. The point that struck me odd, the other day, was that it was her visitation weekend and she took the child back on Sunday because she didn't have a sitter for court. Visitation has been interrupted with romantic interludes. She still smokes. There has been a fraud conviction for her accepting money that wasn't due her, but was due Jewel. Drug and alcohol abuse is prevalent. Heroine was indicated, a overdose the other day, that necessitated hospitalization. She knows that smoke is a trigger to the asthma and yet she still continues to smoke

and only recently, approximately two months ago, decided that it would be a no-smoking household.

Tim, again, hasn't had visitation--has had visitation, but hasn't exercised it. Testimony today indicated that he had two recent visitations. Prior to that time, August 6, 2001 was the date, the Court had made arrangements, the FIA had made arrangements for visitation and he failed to exercise that. In the past, he has lied about Jewel's breathing treatments, the fact that he gave them when he didn't. He has had blackouts from alcohol that interrupted a visit. He had a

cat in direct violation of Court order and several years ago, when the parties were together, he had inappropriate behavior with Jewel, according to Linda's testimony, looking at her feces when there wasn't any feces. He has had subsequent allegations of inappropriate treatment of Jewel when he--she's been in his care.

The Jones', on the other hand, have been taking care of the child since July of 1999. They do have income. They do have the Indian benefits that are now directed to them. They have medical insurance covering Jewel. I am weighing that factor in favor of Mr. and Mrs. Jones.

The length of time that the child has lived in a stable and satisfactory environment with the desirability of maintaining that continuity. As previously indicated, the

Jones' are 64 and 57. The age is a drawback. On the other hand, mom has had visits and the relationship with the other siblings is a positive factor on her side. However, the--most of the time the child has been with the Jones'. I find that the Jones' get favored in this factor.

The permanence of the family unit, the existing or proposed custodial homes. All parties here have adequate homes. The descriptions have been testified to. The mother's relationships still in a state of flux. She has been on a roller coaster, environmentally, since the proceedings began. Tim, likewise, is in a state of flux. He has no direct permanence as to his living arrangement at home. The Jones' have had a long relationship and this factor is favored in their side.

The moral fitness of the parties. Evidence has been presented that mom has had poor choice of relationships,

had had poor relationships in front of the children. The alcohol use had been prevalent and marijuana use, and then most recently, the heroine. The most recent evidence of a problem is the conviction, or evidence of fraud from the Tribal Court.

Tim has had past drug use and consistent alcohol use. He has ben convicted of multiple criminal offenses and one of the exhibits indicated an inappropriate setting for the child to be photographed.

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The Jones' moral fitness hasn't been questioned. That factor is favored in their side.

The mental/physical health of the parties involved. I don't think that there is any questions that most families don't fare well under a microscope and this family isn't one that is going to fare any better. Nobody is perfect. They all have problems. All of the psychological reports indicate that counseling is needed on all concerned. Mom has a self-indulgence. She does put herself first over the care of her children. She has anger--built up anger. She subjects herself to great risk of harm with her substance abuse. The purchasing of heroine from a park from an unknown person to her. The children were in her care. The psychological evaluation indicates that she is not a trusting person. Her own testimony indicates she wasn't truthful to Gloria Rouleau. Glen Swartz closed her case a year ago, however, she is still entering into the activities that were the source of her counseling.

Tim's health. The blackouts from alcohol, the self-inflation that he has of himself, the poor indulgence control,

the excessive lying, the sexuality issues. Dr. Stiger indicates that he needs intensive long-term therapy and Dr. Stiger also indicates that psychiatric care is recommended for Linda as well.

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Mr. and Mrs. Jones have low self-esteem. Both of them have depressive affect. Tend to be emotionally controlling. The therapy that has been recommended hasn't been instituted at this time. The Jones', on the mental health scale, were better suited at this time than either of the parents.

The home, school, and community records of the child. Mother indicated that she was aware of the swimming classes but didn't attend them because two adults were there. Her other children have attendance problems in school. Father hasn't had any activities. Mrs. Jones indicated that she had arranged for the Head Start, the swimming classes, and some classes or activities at Myrtle Beach of developmental nature. Mr. and Mrs. Jones get the weight on that factor.

Preference of the child. The child is too young to indicate a preference. The child has not been interviewed.

The willingness and the ability of each of the parties to continue a close relationship with the other parties. The counselors are going to be involved for a great long time. All of the parties need assistance in this. I have tried, in the past, to indicated that the assistance-the Court is going to make sure that assistance is given at this time. The parents, I hope, are going to start getting the therapy that they need so that they can adjust to be proper parents. The grandparents are going to, hopefully,

get the therapy that they need to have a good relationship with Ms. Davis and their son, Tim Beveridge. There isn't any weight given on this factor to any of the parties.

The domestic violence issue, we've had domestic violence in the home of the Beveridge's when they were a couple, there is further evidence of activity with Mr. Forester, which was not helpful on mother's side. Mr. Beveridge has had several problems in the Beveridge household with Linda and several problems with Angela. There has been no testimony indicating violence in Mr. and Mrs. Jones' home. The factor is weighted in the favor of Mr. and Mrs. Jones.

The other factors--I am not considering any of the other factors. The relationship that the Court is putting in place today is; it is my opinion that it is in the best interest of the child, it is hoped that it is not a long-lasting one, I hope that the parents recognize their weaknesses and address them so that Jewel can be with one or the other of them in days to come. But, at this time, the overwhelming opinion is that the Jones' are the best custodians of--for Jewel at this time. Custody is granted to the Jones'

Counseling is going to be instituted. The psychological--psychiatric care for Tim and Linda is going to be instituted. I haven't researched who would be an available family counselor but that counseling is going to be

instituted immediately. All parties, including Jewel at the appropriate time, are to seek that counseling.

MR. KELLER: Excuse me, all parties both psychological and psychiatric?

THE COURT: Mom and dad haven't addressed the psychiatric counseling that was indicated in the Stiger reports. I do feel both of them need the psychiatric counseling.

MR. KELLER: So all the parties just refers to the psychological. Is that what you mean?

THE COURT: The psychological. The family counseling is all parties, grandparents, mom, and dad. Jewel, at the appropriate time, will be included in that. The Court's position is that lack of counseling is severely detrimental to the child and, if the psychi--counseling isn't instituted at this time the alternative that I see is foster care for the child. I think--

MR. BACARELLA: What if, in the event one of the parties refuses to go, as in the past?

THE COURT: We will deal with that thru any variety of the remedies that I have but the reluctance to get this accomplished has been prevalent throughout this file. I have tried, on numerous occasions and numerous files, to get that accomplished and Jewel is being hurt by the lack of this activity and I sincerely hope that the parents decide from

this day forward and the grandparents decide from this day forward, to realize that this isn't a perfect situation but all of us are involved in and there is a need for great

improvement.

So, at this time, the custody is given to Mr. and Mrs. Jones. Tim's visit is to be only supervised and by adults with approval of FOC. It hasn't been exercised in the past so it will be maximum of two hours per week until further improvement is made. During that time, the child is to have absolutely no time alone with Mr. Beveridge. Mom's visitation is going to be alternating weekends. Thursday at 6pm to Sunday at 6pm. The surveillance has been requested by the parties. That service is available. If you want an alcohol or drug check or house check that fee is $25.00. Please pay it in advance and it will be a random test after that, or a random house check after that.

Grandma and Grandpa, the plan, or at least there was some- testimony, that you thought this relationship should continue until college age. I am not of that opinion. I do think that--, and the State thinks, that the parents should be the primary caregivers and I anticipate that if the parents are aggressive in their therapy and aggressive in their sincerity to become better people that, at some date in the future, that there will be a hearing and if the evidence

shows out that the best interest factors, at that time, indicate a change, the change would be granted.

There is no question in my mind that Grandma and Grandpa are the best place for the child at this time and they have met their burden of proof.

Mom and dad, I do hope that you take a look at yourselves and start seeing what people that have been on the outside looking at you do see and that you start

correcting yourselves so that, not only can you succeed in life, but your daughter can succeed in life. I wish all the parties the best of luck and the judgment will be signed when presented. After the judgment is signed, the limited guardianship will be closed pursuant to the statute.

MR. BACARELLA: Your Honor, I did have one question. Regarding the drug and alcohol request, if made by my clients. Is that something they would make the request thru the Friend of the Court and pay the fee to them?

THE COURT: They can pay the fee at the Clerk's office and the Clerk's office notifies the surveillance group. Yes, Mr. Keller?

MR. KELLER: We request that the mother also be provided the standard Friend of the Court other visitation. Summer vacation, alternate holidays, birthdays, Mother's Day.

THE COURT: That will be on a rotating basis.

MR. KELLER: Standard Friend of the Court-

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MR. BACARELLA: So, would it be the six weeks in the summer, that?

THE COURT: Two weeks in the summer--

MR. BACARELLA: Okay.

THE COURT: --would be appropriate. Yes.

MRS. O'FARRELL: Your Honor, what did you want to do about child support.

THE COURT: As recommended by your office. Anything else, counsel?

MR. KELLER, Your Honor, I don't recall that recommendation. Does that recommend support in addition to $13,000.00 per year that is being paid to them right now? By the Tribal Council? - -

* * *

THE COURT: Okay. Please run the appropriate guidelines with the satisfactory information. If there is any disagreement, please let me know. I will try to work it out informally rather thana formal hearing.

MR. KELLER: Thank you, Your Honor.

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Consent Order 11/29/99 Appointing Guardians **Appendix G**

Approved, SCAO OSM CODE: OAG

STATE OF MICHIGAN	**FILE NO. 99-2258 LG**
PROBATE COURT	**ORDER APPOINTING**
COUNTY OF Iosco	**☐ GUARDIAN ☒ LIMITED GUARDIAN**
Circuit Court – Family Div.	**OF A MINOR**

In the matter of Jewel Beveridge

1.Date of hearing: 1/29/99 **Judge:** John D. Hamilton (P28067)

THE COURT FINDS:

2. Notice of hearing was given to or waived by all interested parties, venue is proper, and a qualified person seeks appointment.

☐ 3. The above named minor is unmarried and is in need of a guardian because:

☐ a. parental rights of both parents or of the surviving parent have been

☐ terminated ☐ suspended

by:

☐ prior court order ☐ judgment of divorce or separate maintenance.

☐ death ☐ judicial determination of mental incompetency.

☐ disappearance ☐ confinement in a place of detention.

or ☐ b. the parent(s) have permitted the minor to reside with another person and have not provided the other person with the legal authority for the care and maintenance of the minor who was not residing with a parent when the petition was filed.

or ☐ c. the biological parents of the minor were never married to each other, the custodial parent has ☐ died ☐ disappeared and the other parent has not been granted legal custody by court order. The proposed guardian is related to the minor within the fifth degree by marriage, blood, or

adoption.

☒ 4. The above named minor is unmarried, and the custodial parent(s) consented to the appointment of a limited guardian and voluntarily consented to suspension of parental rights. A limited guardianship placement plan has been filed and approved.

5. The welfare of the minor will be served by the appointment, ☒ and by ☒ payment of reasonable support ☒ reasonable visitation and contact by the parent(s).

☐ 6. There is no qualified, suitable individual willing to act as guardian and the appointment of a nonprofit corporation as guardian is in the best interest of the minor. A personal bond must be filed.

IT IS ORDERED:

7. Carol & Richard Jones, whose address and telephone
Name (type or print)
number are:
6825 Roanoak, Oscoda, MI 48750 739-4148
Address City State Zip Telephone
is appointed ☐ full ☒ limited ☐ temporary guardian of the minor named above, and

8. This appointment is ☒ regular ☐ temporary, expiring on

_____
Date

☒ 9. **IT IS FURTHER ORDERED:**

The limited guardian shall not return the child to the parents until the limited guardian or the parents petition this Court to terminate guardianship.

All support monies paid by the parents shall be redirected to the limited guardians, Carol and Richard Jones.

11/29/99 /s/ John D. Hamilton
Date Judge

Attorney name (type or print) Bar no.

Address City State Zip Telephone no.

Do not write below this line - For court use only

MCL 700.424; MSA 27.5424, MCL 700.424a; MSA 27.5424(1),
MCL 700.426; MSA 27.5426; MCL700.427: MSA27.5427

PC46b (12/90) **ORDER APPOINTING GUARDIAN/ LIMITED GUARDIAN OF A MINOR**

Consent Petition for Appointment of Guardians **Appendix H**
Approved, SCAO OSM CODE: FGM

STATE OF MICHIGAN		**FILE NO**
PROBATE COURT	**PETITION FOR**	**99-2258-LG**
COUNTY	**APPOINTMENT OF LIMITED**	
CIRCUIT COURT	**GUARDIAN OF MINOR**	
- FAMILY DIVISION		

In the matter of Jewel Beveridge, _____, a minor
Social security no.

1. I am interested in the welfare of the minor and make this petition as custodial parent of the minor.

2. An action within the jurisdiction of the family division of circuit court involving the family or family members of the minor has been previously filed in_____ Court, Case Number _____, was assigned to Judge and _____ ☐ remains ☐ is no longer pending.

3. The minor was born 08/06/98, is unmarried, resides in Iosco County at 5688 N. Janis Drive, Oscoda, MI 48750 and is presently located in Iosco County.

4. The persons interested in this proceeding are:

NAME	RELATIONSHIP	ADDRESS
Timothy Beveridge	Father/ Age 32	8117 Colorado Oscoda. MI 48750
Linda Beveridge	Mother/ Age 38	5688 N. Janis Dr. Oscoda, MI 48750
	Conservator	
Carol & Richard Jones	Guardian	6825 Roanoak Oscoda, MI 48750
	Person with care/ custody of minor*	

***also list persons who has principal care and custody of minor during the two months preceding filing of this petition.**

5. The welfare of the minor will be served by the appointment.

6. A proposed limited guardianship placement plan is attached.

I REQUEST:

7. Carol & Richard Jones whose address is 6825 Roanoak Oscoda, MI 48750 be appointed limited guardian of the minor.

8. Other: _____

(PLEASE SEE OTHER SIDE)

Do not write below this line - For court use only

PC 36 (6/92) **PETITION FOR APPOINTMENT OF GUARDIAN OF MINOR**

MCL 700.424; MSA 27.5424, MCL 700.427; MSA 27.5427,MCR 5.763

Consent Petition for Appointment of Guardians **Appendix H**
Aporoved, SCAO OSM CODE: LGP
STATE OF MICHIGAN **FILE NO.**
PROBATE COURT LIMITED GUARDIANSHIP
COUNTY PLACEMENT PLAN
CIRCUIT COURT –
FAMILY DIVISION
In the matter of Jewel Beveridge, a minor

Special Note in Completing Form:
Each custodial parent who signs this plan is agreeing to all the conditions of the plan even though each item refers to a single person. When more than one parent enters into this agreement and they differ from one another in any area of the plan, each parent must specify their own plans in the space for that area. For example:

- If they differ in their reasons for the guardianship, each parent must specify their own reasons.

NOTICE: This guardianship will not be terminated without a court finding that the termination is in the best interest of the child.

o This plan modifies a limited guardianship placement plan previously approved by the court.

As custodial parent, I desire to establish a limited guardianship for my child and agree to the following plan:

1. The reason I want a limited guardianship is:
   - o To enable my child to attend school in the proposed guardian's school district
   - o To provide health insurance through the proposed guardian.
   - o I will be or am incarcerated until _____ .
   - o I am currently without housing adequate for my child.
   - o I am unable to care for my child because of my health.
   - o I am unable to care for my child because of my mental

instability.

o I desire an alternative to action recommended by child protective services.

o I have lost substantial control of my child's behavior.

☒ I need to improve my parenting skills.

☒ The minor's physical needs for food, clothing, and housing may best be met by the proposed guardian.

o To comply with the requirement of the
0 Reserves. 0 Armed Forces.

o Other.

2. Visits and contact with my child will be sufficient to maintain my parent and child relationship and will be as follows:

o I will visit my child on: (please circle each day you plan to visit) Su M Tu W Th F Sa from: (please specify the time and circle either a.m. or p.m.)_____ a.m. p.m. to _____ a.m. p.m.

o I will visit my child _____ times each
o week. o month.

o Visits will occur at o my residence. o the proposed guardians residence. ☒ To be decided by guardians.

o Telephone contact will take place o daily. o weekly. o monthly. o _____.

o Letters will be sent o daily. o weekly. o monthly. O ___.

o I will attend my child's school conference provided I receive timely notice of the conference.

o I will attend counseling with my child.

o I will participate in and arrange positive outings with my child o daily. o weekly. o monthly. o _____.

o I will provide transportation for my child for _____

o I will attend all doctor/dental appointments for my child (excluding emergencies).

o Transportation to and from visits with my child will be

the responsibility of _____.

o Collect telephone calls will be accepted at number _____

x Other. Visits between the child and parents will be made between the guardians arid the biological parents.

SEE OTHER SIDE FOR REMAINING PLANS

Do not write below this line - For court use only

Approved:

_____
Date

_____
Judge

PC 50 (3/91) **LIMITED GUARDIANSHIP PLACEMENT PLAN** MCL 700.424a(2); MSA 27.5424(1)

Petitioner's 1st ICWA §1913(b) Custody Demand **Appendix I**

Approved, SCAO

STATE OF MICHIGAN **CASE NO.**

JUDICIAL CIRCUIT **MOTION** 99-2258 LG

COUNTY REGARDING CUSTODY

Court address | Court telephone no.

Plaintiff's name, address, and telephone no.	Defendant's name, address, and telephone no.
Linda J. Davis 8012 C. S. Alaska Oscoda, MI 48750 (517) 739-1159	Timothy L. Beveridge 8017-C Colorado Oscoda, MI 48750
Third party name, address, and telephone no. Richard & Carol Jones 6825 Roanoke Oscoda, MI 48750 (517) 739-4148	☐ a. On 11-29-99 a judgment or order was entered regarding custody. ☐ b. There is currently no order regarding custody.

☐ 2. The ☐ plaintiff ☐ defendant ☐ third party was ordered to have custody of the following child(ren):

3. The following child(ren) have been living with Richard & Carol Jones at 6825 Roanoke, Oscoda, MI since 8-30-99.
Complete Address Date

4. Circumstances have changed as follows that require custody or a change in custody:

Use a separate sheet to explain in detail what has happened and attach. Include all necessary facts.

I have taken the necessary steps to ensure the safety & well-being of Jewel and her siblings.

5. Proper cause exists as follows that require custody or a change in custody: Use a separate sheet to explain in detail which factors of the Child Custody Act for determining the best interests of the child(ren) are affected by the circumstances in 4. above. Include all necessary facts.
I am continuing therapy with New Beginnings & have been a client of Turning Point since 9-2000 – ongoing w/both

☐ 6. _____ and I agree to custody, support, and parenting time as follows:
Name
Use a separate sheet to explain in detail what you have agreed on and attach. Include all necessary facts.

7. I ask the court to order that custody, parenting time, and support be as follows: Use a separate sheet to explain in detail what you want the court to order and attach.
Jewel needs to be home with siblings in order to become prepared for school. It would be to her advantage developmentally to be around other children.

I declare that the above statements are true to the best of my information, knowledge, and belief.

12-11-2000 /s/ Linda J. Davis
Date Moving party's signature

FOC 87 (12/96) MOTION REGARDING CUSTODY
MCL 722.21 et seq.; MSA 25.312(1) et seq.; MCR 2.119, MCR 3.213

Petitioner's 2nd ICWA §1913(b) Custody Demand **Appendix J**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF IOSCO

LINDA DAVIS (f.k.a. Beveridge),

Plaintiff;

v **File No. 99-2099-DM (H)**

TIMOTHY BEVERIDGE

Defendant,

_____/

EDWARD M. KELLER, P15809
Attorney for Plaintiff
1864 N. US 23
Tawas City, MI 487631
(989) 362-9930

JAMES BACARELLA, P46198
Attorney for Third Party Custodians Richard and Carolyn Jones
228 E. US 23
East Tawas, MI 48763
(989) 362-1364

_____/

TIMOTHY BEVERIDGE
In Pro Per
8117 C. Colorado
Oscoda, MI 48750

_____/

Pursuant to LCR 2.119 I hereby certify that contacting opposing parties would be futile for the reason that the third party custodians have recently filed their motion for continued custody which remains pending.

/s/ Edward M. Keller
EDWARD M. KELLER, P15809

MOTION TO MODIFY JUDGMENT OF DIVORCE
RE: CHILD CUSTODY

1. Pursuant to the within Judgment custody of the

one minor child Jewel was ordered to "temporarily remain with Richard Jones and Carolyn Jones, parents of Defendant, Timothy Lee\Beveridge, pending further order of the court.

2. That order has recently been continued pending a new Friend of the Court investigation and psychological evaluation of all parties seeking custody of said child.

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3. At the time of the Divorce Judgment Plaintiff had been arrested and was facing false felonious assault charges brought by her then husband Timothy Lee Beveridge.

4. Said charges have subsequently been dismissed.

5. Since entry of that Judgment Plaintiff has substantially improved her quality of life and is a fit and proper person to be awarded physical custody of Jewel.

6. Plaintiff resides in an appropriate residence in losco County, Michigan with her other minor children who are siblings of Jewel.

7. In the last six months Plaintiff has been through a myriad of evaluations, counseling and parenting programs, all of which she has completed to the satisfaction of the Family Independence Agency and the losco County Probate Court.

8. It is in the best interest of the minor child Jewel that Plaintiff be awarded her legal and physical custody, care and control.

9. It is not in the best interest of the child that Defendant Father be permitted either custody or

unsupervised parenting time with said child.

WHEREFORE Plaintiff requests this court enter its order modifying the within Judgment to provide that Plaintiff be awarded the sole legal and physical custody of the minor child Jewel and that appropriate orders be entered regarding parenting time, support and related matters.

May 11,2001

/s/ Edward M. Keller
EDWARD M. KELLER, P15809
Attorney for Plaintiff

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STATE OF MICHIGAN

IN THE 23rd CIRCUIT COURT - FAMILY DIVISION

FOR THE COUNTY OF IOSCO

LINDA JEWEL DAVIS (f/k/a BEVERIDGE),
Plaintiff,

Vs. File: 99-2099-DM

TIMOTHY BEVERIDGE,
Defendant,

_____ _____/

Richard and Carolyn Jones,
Third Party Custodians

_____/

CUSTODY TRIAL –VOLUME III OF III
BEFORE THE HONORABLE JOHN D. HAMILTON
Tawas City, Michigan - Friday, May 6, 2002

APPEARANCES:

For the Plaintiff: KELLER & MOIR
Edward M.Keller (P15809)
1864 North US-23
East Tawas, MI 48730
(989) 362-9930

For the Defendant: IN PRO PER

For the Third Parties: James Bacarella (P46198)
1228 East US-23
East Tawas, MI 48730
(989) 362-1364

Recorded By: Diane Knafla, CEO #6370
(989) 362-3497

Petitioner's Argument Raising ICWA & Troxel **Appendix K**

Tawas City, Michigan
Friday, May 6, 2002 - 8:05 a.m.

EXCERPT OF PAGES 31-37

CLOSING ARGUMENT BY MR. KELLER (Counsel for Linda Davis):

* * *

Most important, the evidence shows that Linda Davis and Jewel Davis are members of the Chippewa Indian Tribe. They are both registered members. They have registration numbers. Jewel is number M004999. That has been placed in the record in this case previously.

United States Congress states in law that is binding in this Court:

> "There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. And the United States has a direct interest, as trustee, to protect the Indian children who are members of, or eligible for membership, in the Indian tribe."

Next.

> "The alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public or private agencies. And that an alarmingly high percentage of such children are placed in non-Indian foster and adopted homes. And that the States, exercising their recognized jurisdictions over Indian

child custody proceedings thru administrative and judicial bodies have often failed to recognize the essential tribal

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relationship--relations of Indian children in the cultural and social standing prevailing in Indian communities and families. 25-USC-190l et seq.

> "That Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards. For the removal and the placement of such children in foster or adopted homes which will affect the unique values of Indian culture."

Elsewhere the statute describes foster homes as including custody hearings in domestic relations or divorce cases. And, as a matter of fact, they address this under 25-USC-l902 subsection I--subsection small one rather, states:

> "Foster care placement shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand. And where parental rights have not been terminated.

* * *

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Returning if I may, Judge, to the United States citation under Subsection 1921.

"In any case where fed"--I'm now going to eliminate the words that don't count because there is or this or that. And to simplify it, I'm skipping the ones that don't apply. Which, in my belief, does not change the context. Does not change the meaning at all.

> "In any case where federal law applicable to a child custody proceeding under state law provides a higher standard of protection to the rights of the parent of Indian, or Indian custodian, of an Indian child they have the rights provided by this subchapter, the State shall apply the federal standard."

Shall. Mandatory.

25-USC-Section 1913. That Congress (inaudible) to protect the children's rights in Indian cases as follows:

> "Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian."

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Mandatory language.

> "A child accepted for foster care", and the description of foster care includes child custody disputes, "Any child accepted for foster care shall be placed in the least restrictive setting which most approximates the family and, in which the special

needs, if any, may be met. In any foster care or preadoptive placement, a preference--," a preference, "--a preference shall be given in the absence of good cause to the contrary to a placement with--" Roman numeral, small one, -a member of the Indian child's extended family."

And I note that in the next section extended family means a preference for Indian heritage family and there is no verified Indian heritage here on the part of the Jones'.

Second choice after that is a foster home;licensed, approved, or specified by the Indian child's tribe and there foster homes are also described.

"The standards to be applied in meeting the preference requirements by this Section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family maintains social and cultural ties."

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I suggest that can only happen here with Linda Davis, or possibly her adult daughter Becky. Here is a legal test created by the United State Congress applied to this state by the language I previously described. Subsection 1912.

"Any party seeking to effect a foster care placement of an Indian child under State law, shall--" mandatory, "--satisfy the Court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts

have proved unsuccessful."

And I suggest that the evidence of the few instances of less than model conduct over a two year period is not such failure on Ms. Davis' part.

> "No foster care placement may be ordered in such proceedings in the absence of a determination supported by clear and convincing evidence including testimony of qualified expert witnesses that the continued custody of the child by the parent or any custodian, is likely to result in serious emotional or physical damage to the child."

There is no such evidence in this case by a ponderance, much less by clear and convincing evidence. I have the printouts, eminent printouts of the statutes

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available for the Court, if you would like to refer to them, Your Honor.

* * *

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I return, as I mentioned at the outset, to the Troxel case when the United States Supreme Court determined two years ago, a year and a half ago, that:

> "The liberty interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530-US at 65.

"In addition to the specific freedoms protected by the Bill of Rights, the liberty especially protected by the Due Process Clause includes the right to direct the education and upbringing of one's children. In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the 14th Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. A Judge's decision cannot take the place of the desires of a parent in deciding what is in the child's best interest in a disagreement between a parent and a nonparent." 530 US at 68.

"There is a presumption that fit parents act in the best interest of their children." 530 US At 69.

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The Washington Superior Court in that decision was found by the U.S. Supreme Court to have erred in not giving special weight to the parent's determination of her daughter's best interest.

What is the difference between Jewel and Elijah and Harvey and Jewel's sister--
MS. DAVIS: Rachel.

MR. KELLER: --Rachel? They have the same mother. They were, by agreement of Linda Davis, placed outside of their home when she was arrested for a crime she has been exonerated of, to the extent the charges have been dropped. All of the other three children were returned promptly. Now, Jewel. What is the difference? The difference is there are some grandparents that want a child. They want Jewel. They want to do the second time that what they didn't do the first

time around. Both of them. Is there any other difference? None. Is there any claim that Linda Davis in an unfit parent to those three children? No and it has been so found by this court in its order returning custody and relinquishing jurisdiction over Linda Davis and that family, in the cases regarding Elijah, Harvey, and Rachel; and the recommendation of Mr. Philburn.

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STATE OF MICHIGAN

IN THE 23rd CIRCUIT COURT - FAMILY DIVISION

FOR THE COUNTY OF IOSCO

LINDA JEWEL DAVIS (f/k/a BEVERIDGE),
Plaintiff,

Vs. File: 99-2099-DM

TIMOTHY BEVERIDGE,
Defendant,
_____/

Richard and Carolyn Jones,
Third Party Custodians
_____/

PRE-TRIAL HEARING
BEFORE THE HONORABLE JOHN D. HAMILTON
Tawas City, Michigan - Friday, February 15, 2002

APPEARANCES:

For the Plaintiff:	KELLER & MOIR Edward M.Keller (P15809) 1864 North US-23 East Tawas, MI 48730 (989) 362-9930
For the Defendant:	IN PRO PER
For the Third Parties:	James Bacarella (P46198) 1228 East US-23 East Tawas, MI 48730 (989) 362-1364
Recorded By:	Diane Knafla, CEO #6370 (989) 362-3497

Petitioner's Pretrial Reliance on ICWA **Appendix L**

Tawas City, Michigan
Friday, February 15, 2002 - 1:50 p.m.

EXCERPT OF PAGES 3-4

THE COURT: Okay. Present in the courtroom is Timothy Beveridge, Linda Beveridge; her attorney, Mr. Keller, grandparents; and Mr. Bacarella. Date and time scheduled for final Pre-Trial Are you Proceeding without counsel Mr. Beveridge?

TIMOTHY BEVERIDGE: Yes, Your Honor.

THE COURT: Is the matter ready for trial?

MR. KELLER: Yeah, it is on our behalf, Your Honor. There is a legal issue we want to raise. We can notice it for trial. it has to do with the Federal Indian Welfare Rights Act, which limits the Court's choices in placement of the child of Indian heritage which we believe may not be being complied with right now.

MR. BACARELLA: This is the first this issue has been brought up. it appears Ms. Beveridge has--or Ms. Davis has, at all times, submitted to the jurisdiction of this Court.

MR. KELLER: Don't disagree with either of those statements, Judge.

THE COURT: Okay.

MR. KELLER: I was not involved in this case when the placement was made and don't know that she had an attorney when it was.

MR. BACARELLA: Mr. Shotwell.

THE COURT: If you want to raise that issue, brief it, and schedule it for hearing.

MR. KELLER: Separate from the trial, Judge?

THE COURT: Yes. **If you're contesting it in advance.** As far as I know, the three competing parties are the three that are here today.

MR. KELLER: And that's true. That--this doesn't change that.

THE COURT: Okay. If you're contesting whether there could be placement with the grandparents -

MR. KELLER: Under that law we are.

THE COURT: Okay. Brief it and file it for a motion. The--how long is it, the trial, you are anticipating? How many Witnesses?

Excerpts of 4/26/2002 Trial Transcript **Appendix M**
Petitioner's Other Children and Her Exoneration of Assault

STATE OF MICHIGAN

IN THE 23rd CIRCUIT COURT - FAMILY DIVISION

FOR THE COUNTY OF IOSCO

LINDA JEWEL DAVIS (f/k/a BEVERIDGE),
Plaintiff,
Vs. File: 99-2099-DM

TIMOTHY BEVERIDGE,
Defendant,
_____/

Richard and Carolyn Jones,
Third Party Custodians
_____/

CUSTODY TRIAL - CONTINUED
VOLUME II OF III
BEFORE THE HONORABLE JOHN D. HAMILTON
Tawas City, Michigan - Friday, April 26, 2002

APPEARANCES:

For the Plaintiff:	KELLER & MOIR Edward M.Keller (P15809) 1864 North US-23 East Tawas, MI 48730 (989) 362-9930
For the Defendant:	IN PRO PER
For the Third Parties:	James Bacarella (P46198) 1228 East US-23 East Tawas, MI 48730 (989) 362-1364
Recorded By:	Diane Knafla, CEO #6370 (989) 362-3497

Excerpts of 4/26/2002 Trial Transcript **Appendix M**
Petitioner's Other Children and Her Exoneration of Assault

Tawas City, Michigan
April 26, 2002 – 9:10 a.m.

EXCERPT OF PAGES 7 AND 34-35

Q. Could you please state the names and ages of each of your children?

A. [Linda Davis}: Rebecca Davis, 20; Harvey Doncoes, 11; Elijah Davis, 6; Rachel Davis, 8; Jewel Beveridge, 3. And a grandson, 2 years old.

Q. Could you describe the health of those children?

A. [Linda Davis]: Fortunately, I've been blessed with healthy children~ They've been to the doctor for colds and such but, for the most part, they've been very healthy children. Except for my daughter Rebecca, she began having seizures at twelve months of age. I almost lost her at one point and in the last three years, she has had four episodes, three of those occurred while she was living in Ypsilanti, Michigan. I don't keep a log of dates and times but I had to go to Ypsilanti to take care of my grandson. His father was there but he's not the emotional support that my daughter needed or my grandson needed.

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* * *

Q. Did it--is it true that, as a result of that arrest, eventually there was a hearing in this courtroom, in District Court, in which Tim testified as to what happened?

A. [Linda Davis] Yes.

* * *

Q. And that after the prosecutor read that transcript, he threw the charges out?

MR. BACARELLA: Your Honor, I'm going to object. That calls for speculation.

MR. KELLER: I have a copy of the nolle prosequi.

* * *

Q. Is it true that after that, there was a transcript made of that hearing where Tim testified making certain accusations about his version about what happened?

A. [Linda Davis] Yes.

Q And after that transcript was created, were the charges dropped by the prosecutor?

A. [Linda Davis]: * * * 1 retained you and yes, the charges were dropped.

Q. Do you have any convictions as a result of that Conduct?

A. [Linda Davis]: No.

TRIAL TESTIMONY AND EXHIBITS

Trial transcripts are given Roman numbers:
Volume I: April 22, 2002 Volume II: April 26, 2003
Volume III: May 6, 2002
[Note: Because so many of the parties, children, and witnesses have the same last names, to avoid the clumsiness of constantly repeating both surnames and family names, first names will be used freely in the summary that follows. No disrespect is intended to any person so referenced.]

At the outset of trial (TR I, pp. 17-19, 20, 158[1]), a number of exhibits were admitted by stipulation:

Exhibit 1 Protective Services investigation reports
Exhibit 2 Psychological report on Linda Davis
Exhibit 3 Friend of the Court reports OR[2] Oscoda Health Park notes on Jewel
Exhibit 4 Friend of the Court recommendations
Exhibit 5 Psychological evaluation[3] of Carolyn Jones
Exhibit 6 Psychological evaluation[3] of Linda Davis
Exhibit 7 Psychological evaluation[3] of Richard Jones
Exhibit 8 Psychological evaluation[3] of Timothy Beveridge,
Exhibit 9 Linda Davis' Saginaw Chippewa Tribal Court conviction for fraud regarding multiple applications for a tribal stipend for Jewel while Jewel was living more than 51% of the time with the Joneses

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[1] Exhibit 1 was admitted at the commencement of trial, but not clearly identified for the record until this point during the trial.

[2] The transcript indicates the former, but exhibit copies supplied by trial counsel show the latter. Other exhibit numbers have been conformed to match the "hard" copies.

[3] All psychological reports were prepared by Dr. Ted R. Stiger, a psychologist.

Petitioner's Summary of Testimony and Exhibits **Appendix N**

Exhibit 10 Circuit court felony disposition as to Timothy Beveridge (B&E vehicle, resisting and obstructing police officer – 2 counts)

Exhibit 11 Oscoda Area Schools report of 4/9/02

Exhibit 12 Petition for Appointment of Limited Guardian

OR[2] Investigative Report of Children's Protective Services Complaint

THE JONESES' WITNESSES

Angela Beveridge, then[4] the wife of Timothy Beveridge, testified that she and Mr. Beveridge were married on May 19, 2000. She identified Carolyn Jones as Tim's adoptive mother and Richard Jones as his adoptive stepfather, and Jewel as Tim's first child[5], by Linda (TR I, pp. 23-24).

Angela was primary caregiver for Jewel when Tim had visitation and Tim was at work, otherwise she and Tim shared the parenting responsibilities. Angela was aware Jewel has asthma and is allergic to pet dander, and thus Tim agreed to remove the cat from the house, but did not do so. Tim could not grasp that the cat made Jewel sick (*Id.*). Still, to the best of Angela's knowledge, Jewel never had an asthma attack while in Tim's home or care (*Id.*, p. 34).

Tim had been ordered by the Court, as part of a parenting plan, to quit drinking, but he simply could not remain sober for long (*Id.*, p. 25). Tim is careless of his own safety and Jewel's, and seems not to notice when injury occurs or how it happened (*Id.*, p. 28). For this reason,

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[4] Angela and Tim separated on September 14, 2001. (*Id.*, p. 27).

[5] Angela had a child by Tim also, so this reference means Jewel is Tim's first biological child. Jewel is Tim's only child by Linda.

Angela won't leave Tim alone with their daughter Abigail because he is so careless (*Id.*, p. 29).

According to Angela, Tim has a Jekyll and Hyde personality—he is charming and kind when sober, but mean when drunk (*Id.*, pp. 30-31).

Timothy Beveridge, Jewel's biological father, testified that while living with Linda and Jewel, Linda hit him in the head with a potted plant (March 1999) (*Id.*, p. 37). In June, 1999, Linda slapped him a few times; in July, 1999 he was stabbed by Linda during an argument (Tim showed the Court a half inch scar on his right arm) (*Id.*, pp. 39-40). This was the incident that led to the felonious assault charge against Linda. When Linda supposedly stabbed him, he had just torn the phone off the wall as she was trying to call his parents; when the prosecutor learned of this, he dismissed the assault charges against Linda (*Id.*, p. 68). Linda had bruises on her arms and legs, some of which he put there (supposedly in self-defense) (*Id.*, p. 72).

Tim admitted to drinking to excess, as Angela described, and that Jewel developed allergies after being placed with the Joneses. Before the onset of Jewel's asthma, Tim had owned a cat (*Id.*, pp. 45-46). About 2-3 weeks after he promised to remove the cat he did so and had the house cleaned; meanwhile, Jewel was not at the house . He had pictures of Jewel with the cat, Jewel never had any problems being near the feline, and he could not understand how she could suddenly be allergic to it (*Id.*, p. 47).

Tim himself had allergies while living in the Jones' home; he thinks there is something wrong with their home (*Id.*, p. 48). Tim acknowledged receiving a letter from Jewel's

treating physician identifying asthma triggers, including cats (*Id.*),

Tim testified that he did not avail himself of Tuesday visitation rights because it was supervised and unpleasant for everyone, so he saw no reason to continue (*Id.*, p. 49). Tim informally relinquished his visitation rights and transferred them to Linda instead. Tim has paid for uninsured medical costs of Jewel except the last month, which he couldn't afford ((*Id.*, pp. 51-52). According to Tim, Linda never had a cat and does not like cats (*Id.*, p. 64).

Tim testified that the Joneses have no relationship with their other grandchildren (*Id.*, pp. 65-66). On the other hand, Jewel and Linda have a very close relationship (*Id.*, pp. 68-69). Tim described Jewel as being "trapped" into living with the Joneses (*Id.*, p. 70).

Pat O'Farrell, the Friend of the Court case manager/investigator for Iosco County, did a court-ordered investigation for this case, including a home inspection, questionnaires, school contact, and review of Dr. Stiger's psychological evaluations of all parties. O'Farrell spoke with the alcohol counselor who treated both Linda and Tim, contacted Protective Services, the Probate Court, and family counselor Gloria Rouleau, and also obtained Jewel's medical records from Tawas St. Joseph Hospital. Her report was in evidence, and on that basis her testimony was ruled cumulative. (*Id.*, pp. 77-80).

Vicki Beveridge, Tim's stepmother, testified that Carolyn Jones is her current husband's ex-wife; she is on good terms with the Joneses, and she stays with them when she visits Jewel (*Id.*, pp. 82-83). Jewel has lived with the

Joneses since July, 1999 (*Id.*, p. 83); in Vicki's opinion, the Joneses have a loving home (*Id.*, p. 84).

Jewel's asthma attacks happen in the middle of the night, almost always after she has visited Tim, occasionally after a visit with Linda (within 24 hours). during an attack, Jewel coughs until she vomits (*Id.*, p. 85). When this occurs, Jewel gets a breathing treatment involving use of a nebulizer; the Joneses know just what to do to calm and distract Jewel during the treatment (*Id.*, p. 86). Tim tried to give Jewel a breathing treatment once, but his patience was quickly exhausted and he quit before it was complete (*Id.*, pp. 92-93).

Vicki claimed to have spoken on the telephone with Linda in August 1999, when Linda supposedly admitted she was drunk (*Id.*, p. 95). On Jewel's second birthday, Linda admitted to using marijuana sometimes, and was insouciant to Vicki's request not to smoke around Jewel; Linda admitted smoking in the basement and not realizing the smoke would filter upwards (*Id.*, pp. 98-100).

Carolyn Jones, Jewel's step-grandmother, testified that when Linda was arrested for stabbing Tim, Carolyn was asked by Linda to take care of Jewel (*Id.*, p. 106). Carolyn and her current husband Richard Jones became limited guardian of Jewel in late November, 1999 (*Id.*, p. 107). Carolyn is 57 years old, Richard 64 (*Id.*, p. 134).

For her asthma, Jewel is now on steroids and needs breathing treatments much less frequently (*Id.*, p. 109). Carolyn claimed that Jewel has had asthmatic reactions after returning from Linda's house (*Id.*, pp. 131-132).

Linda has attended some of Jewel's medical visits, but Linda also missed a few, including one in Saginaw when

Jewel had a compressed skull fracture (*Id.*, p. 110). Carolyn registered Jewel in Head Start; Tim and Linda did not participate in that registration (*Id.*, p. 112). Carolyn also enrolled Jewel in swimming classes; Linda was invited to attend but never did (*Id.*, p. 113).

Carolyn and Richard have 3 other grandchildren with one on the way, and they have contact with them or their parents, but she admitted having no contact with Abigail or other grandchildren recently. Dick's last contact with his children was a letter and a postcard from Europe (*Id.*, pp. 114-115).

Jewel has many toys, mostly from her Bevcridge grandparents, none from Tim, some from Linda (*Id.*, p. 116). Tim has not visited Jewel since her 3rd birthday (*Id.*, p. 117). Consistent with the Joneses' unproved suspicions that Tim may be a pedophile, Jewel has manifested a vaginal irritation when returning from Timothy's, but never when returning from Linda's (*Id.*, p. 118).

The last time Carolyn picked up Jewel from Tim he was intoxicated, and he was frequently drunk when they lived downstate (*Id.*, pp. 119-120). Jewel has frequent bouts of asthma when returning from Tim's (*Id.*, p. 121).

Linda has Jewel every week from Thursday evening until Monday evening, but exercised her visitation rights only 39 of 80 days (*Id.*, pp. 124-125). According to Carolyn, Linda's excuses were varied—romantic interlude, massage, aerobics, too much chaos in her house (*Id.*, p. 127). Carolyn also claimed that Linda has picked up Jewel after using marijuana, but had another person drive (*Id.*, p. 130) Carolyn claimed she witnessed violence in Linda's home on 9/26/99 (*Id.*, p. 133). Carolyn keeps copious notes, but

despite claiming that Linda was drunk when they spoke on the phone within the past 6 months, her notes show nothing more recent that a year previously (*Id.*, p. 138).

Carolyn claimed to be a fifth generation descendant of Sacagawea, who was a Shoshone, not a Chippewa; her husband Richard has no Indian blood, and neither claims membership in an Indian tribe (*Id.*, p. 135). As a result of having custody of Jewel, Carolyn was able to quit her job, which is made up for by $13,000 a year in money paid by the Saginaw Chippewa Tribe for Jewel's care (*Id.*, pp. 135-136). Jewel is eligible for BCBSM coverage through the Tribe, but the Joneses think their health insurance is better (*Id.*, p. 142).

Carolyn, who was diagnosed by Dr. Stiger as having sexual feelings toward Tim, and whom Tim blames for bad parenting that engendered his many problems, was ordered by the Court to enter counseling with Tim, but did not (*Id.*, p. 140).

Barbara Irby is a p. 146 former neighbor of Linda and Tim; they moved away more than 2 years ago (*Id.*, pp. 146, 154). The house initially occupied by Linda and her first husband and their children, then by Linda and Tim and the children (*Id.*, p. 147). Sometimes the children were unsupervised, although they were never left alone (*Id.*, p. 153).

The "little guy" (older than 1 year but still in diapers) was seen playing in the road unsupervised (*Id.*, p. 148). Occasionally, Irby heard loud arguments or doors slamming, but she never saw any violence. On a few occasions the children could not get in the house, but Irby was uncertain if they were locked out or being kept out by the parents for

some disciplinary reason (*Id.*). Irby described Tim as neighborly; she never spoke to Linda (*Id.*, pp. 149-150).

Dr. Ted R. Stiger, Ph. D., psychologist, evaluated all 4 adults in this dispute—Tim on 11/16/00, Linda on 5/22/01, Carolyn on 8/27/01, and Richard on 9/4/01 (*Id.*, pp. 157-158). Stiger found Tim to be extremely narcissistic and to have extreme self-inflation, antisocial characteristics, poor impulse control, sexual confusion and maladjustment (*Id.*, pp. 159-160). This makes Tim a poor prospect as a parent to provide a predictable, empathic, consistent and nurturing environment (*Id.*, pp. 160-161). Stiger thought that Tim might be helped by 2-3 years of intensive therapy (*Id.*, pp. 161-162).

Stiger opined that Linda suffers from narcissism, self-indulgence, difficulties in identity formation, self-definiton, psychological boundary issues, prone to being dependent on others, especially males, and that she has accumulated anger and resentment, suspiciousness, mistrust, anxiety or depression, and risk of acting out (*Id.*, pp. 162-164). This produces a roller coaster environment not best for raising children Continued therapy was recommended, as well as a psychiatric consultation—Stiger noted that Linda was on antidepressant medication when he saw her a year before trial (*Id.*).

Stiger found that Carolyn Jones has low self-esteem, depressive affect, that she is inclined (like Linda) to assume a rescuing type role, and has a proclivity toward dependency, especially males. Carolyn suffers from confusion as to sexual identity and sexual issues, and has a proclivity to be overly emotionally controlled But in Stiger's view she is nonetheless somewhat more emotionally stable than Linda (*Id.*, p. 165).

Richard Jones was deemed by Dr. Stiger to be overly passive, to have low self-esteem, depressive affect, dependency/autonomy conflicts, and to be overly emotionally controlled, but Stiger found no indications of extreme psychopathology, confusion, or emotional difficulties (*Id.*, p. 166).

Stiger thought that continued FIA involvement would be warranted; he opined there are too many red flags as to the parents (*Id.*, p. 167). (However, the FIA had closed its file on Linda, after a series of investigations—see TR II, pp. 39-40).

Stiger thought that the Joneses need ongoing therapy and possibly antidepressant medication, but he saw no need for FIA involvement if they remain custodians (TR I, p. 168). As to Linda, if she successfully raised other children—a fact of which he was wholly unaware—that would be an important factor to address (*Id.*, p. 172). If Linda had been involved in therapy since his evaluation, that would also be favorable for her, and sibling attachments are potentially important as well (*Id.*). Stiger did not factor these proven facts into his evaluation, since he knew nothing about them.

Stiger's recommendations likewise do not take into account the quality of attachments, which are important factors (*Id.*, pp. 172-173). Stiger opined that Tim's problems seem to be attributable at least in part to how he was raised by the Joneses, but this cannot be quantified (*Id.*, p. 173). Stiger felt that if Carolyn has resisted therapy to resolve ongoing mother-son issues, that would be a negative factor (*Id.*, p. 174); he was, again, unaware that she had been ordered to participate in counseling with Tim and had failed to do so.

Dan Dykes is another former neighbor of Linda; they dated for a while (he is now homeless); he knew Linda for about 2½ years before that (they went to school together) (*Id.*, p. 180). Although they were intimate and lived together to some extent, he has never observed Linda use drugs (*Id.*, p. 181).

Dykes was involved in an argument at the Davis' home in the Fall of 2001 that led to 911 being called (it was an argument over their sex life while he and Linda were living together) (*Id.*, pp. 182-183). Dykes saw Linda intoxicated only 1 time—and he's not really sure about that (*Id.*, pp. 183-184). Dykes noted that the Jones' criticism of Linda in terms of her involvement in Jewel's birthday celebrations or Xmas is misplaced; because Linda is a Jehovah's Witness, she does not celebrate children's birthdays or Xmas (*Id.*, pp. 184-185). Dykes observed that if any of her children were hurt or needed Linda for anything, Linda would be "right there for them." (*Id.*, p. 186).

Richard Jones testified that he and Carolyn became guardians of Jewel on 11/29/99, but had already had custody since July, 1999 (*Id.*, p. 194). Jewel was diagnosed with asthma in May 2000; her breathing treatments require about 10 minutes, depending on the medication (one takes a bit longer) (*Id.*, p. 195). Whenever Jewel was with Tim, Richard would give Tim the nebulizer, but he was able to determine that Tim did not use it (*Id.*, pp. 196-197).

Carolyn enrolled Jewel in Head Start after discussing it with Linda, who approved; Richard realizes it's important for Jewel to be around other children (*Id.*, p. 198). Richard has 3 other grandchildren; he's had lunch with his other son Richard maybe 5-6 times in 5 years and played golf with him

once during that time frame, and caddied for him during the Michigan Open (*Id.*, pp. 195-196).

Richard admitted that he had a falling out with his daughter, who decided to adopt her step-father's name, but on 1/28/02 she called him out of the blue and they have written several times (*Id.*, pp. 201-202). He and Tim have been estranged for a while also (*Id.*, p. 203).

Richard was unable to say that he's actually seen Tim drunk, although he knows Tim has been convicted of drunk driving more than once (*Id.*, p. 204). Linda exercised only 36% of her visitation since the guardianship began (*Id.*, pp. 205-206). On August 6, 2000, Richard claimed that Linda admitted to substance abuse (but not when she had custody of Jewel) (*Id.*, pp. 206-208, 212). On 10/27/01 he had a phone conversation with Linda where he urged her to go to rehab; then he went over to pick up Jewel and cigarette smoke just "rolled out" of the house (*Id.*, pp. 209-210). The Joneses and Linda went to great lengths to remove all dust from their homes, put in air cleaners, etc. to help Jewel's asthma (*Id.*, pp. 214-215).

LINDA DAVIS' WITNESSES

Ronald Philburn, Protective Services Worker (*Id.*, p. 232), testified that Linda complied with all aspects of parenting plan he devised, and she was fully cooperative (*Id.*, p. 235). Philburn supported the placement with the Joneses as being in the child's best interest—Jewel seemed to be the focus of a destructive relationship between Linda and Tim. (*Id.*, pp. 235-236). However, subsequent to the divorce, he saw no reason why Jewel should not be returned to Linda at this time (*Id.*, p. 236).

Philburn has had lots of interaction with Linda, and would rely on his own evaluation as to Jewel's best interests, rather than defer to Dr. Stiger (*Id.*, p. 241). Philburn's conclusions are based on actual observations and interaction with the people over time, while Stiger's opinions are based on tests and abstract conclusions therefrom (*Id.*, p. 243).

Joseph Filka, an Au Sable Valley Community Mental Health employee with a master's degree in psychology and a registered social worker; works mainly with middle school students (*Id.*, p. 244). He has worked with Linda's son Harvey Doncoes; Linda was very receptive and eager to help once the program was explained to her. Harvey's academics and attendance have significantly improved (*Id.*, p. 245).

Filka would give Linda much of the credit for that improvement; she also seem quite functional with her other children (*Id.*, p. 246). Harvey's problems were partly from indecision whether he wanted to live with Linda or downstate with his biological father; he chose Linda after visiting his father at Xmas (*Id.*, p. 247). Filka noted that most of Harvey's school absences were excused (*Id.*, p. 248).

Patricia Columbo, who is employed in a domestic violence shelter with both residential and non-residential services (*Id.*, p. 250), testified that Linda came to her in 2000 to learn about participating in a support group; Linda enrolled and has remained so (*Id.*, pp. 250-251).

Linda has changed markedly since beginning the support program—Linda is now more self-controlled, manages her anger better, displays empathy, is properly assertive instead of aggressive, and is emotionally strong and caring (*Id.*, p. 253). Linda has worked through her

problems and established a healthy life for her children (*Id.*, p. 254).

Rebecca Davis is Linda's 20-year old adult daughter; Rebecca is a high school graduate enrolled in college, while employed in a managerial position at Rite Aid Pharmacy; Linda cares for Rebecca's son while Rebecca is taking classes at night (*Id.*, pp. 257-258).

Linda has a great relationship with her grandson, Linda is a good mother whose children look to her for needs and guidance (*Id.*, p. 259). Rebecca has not seen Linda drunk in a long time, never saw Linda smoke marijuana, and has not told anyone Linda is or ever was unable to care for her children (*Id.*, pp. 262-265). Rebecca moved in with her in-laws for two summers when she was 17 and 18, and again lived elsewhere when Linda cohabited with Mr. Forester, whom Rebecca did not like (*Id.*).

Timothy Beveridge testified that his natural mother is Carolyn Jones. Carolyn made him live in a pink bedroom, and occasionally dressed him in girl's clothing (TR II, pp. 4-5).

Linda Davis testified after a night without sleep, a result of her stepmother dieing during the night (*Id.*, p. 6), Linda testified that she's been fortunate to have healthy children, with the exception of Rebecca, who has epilepsy (*Id.*, p. 7).

Linda testified that her children support each other, including Jewel, who had no signs of illness before going to the Jones' home (*Id.*, p. 8). Jewel was diagnosed with asthma after living with the Joneses about six months (*Id.*, p. 9). Linda has twice attended to Jewel's asthma attacks,

administering the prescribed breathing treatment (medicine infused through a nebulizer) each time (*Id.*).

Linda brought her other children to the Joneses one time for Jewel's birthday party, but since that time they have not been invited back (*Id.*, p. 10). Linda has been allowed to take Tim's visitation, but she has been able to visit Jewel regularly at the Joneses only occasionally; Linda's need to attend to her other children makes it difficult to get away to see Jewel, but if Jewel were living with Linda that would be more manageable (*Id.*, pp. 10-11).

Linda has not had good relations with the Joneses, who seem to be intent on keeping Jewel from her and accusing her of all kinds of things (*Id.*, p. 13). Indeed, Ron Philburn had noted in his file, after Linda granted the Joneses' temporary custody of Jewel, that "their hidden agenda is to gain custody of Jewel." (*Id.*, p. 45). In contrast, Linda's relationship with Jewel is very close, and Jewel is always delighted to see Linda and cries when Linda has to leave her (*Id.*, p. 14). At the Joneses, Jewel has no exemplars of physical affection; the Joneses never hug, kiss, etc. (*Id.*, p. 15).

Both Linda and the Joneses use the "time out" method of disciplining children (*Id.*, p. 16). However, Richard once threatened to strike Jewel with his belt; Linda does not believe Richard would have done so, but opposes that kind of threatening behavior (*Id.*).

Linda's grandson is also asthmatic, so Linda studied up on the disease. (*Id.*, pp. 16-17). After that, Linda had all her carpets cleaned, her ducts vacuumed, she changes furnace filters every two months, and she installed air purifiers in all children's rooms along with humidifiers (*Id.*,

p. 21). Linda maintains no pets, and allows no animals in her house (*Id.*, p. 22). Linda quit smoking in her bedroom, even using an exhaust fan, after learning how unhealthy it could be for them (*Id.*).

The occasion where Linda was unable to be present when Jewel was seen by a doctor arose when Rebecca had an epileptic seizure (*Id.*, p. 17). Linda showers Jewel with love and affection, but not so much with material things, due to financial limitations (*Id.*, p. 25).

Linda has never left her children unsupervised or allowed them to play in the road. However, her children are very active and rambunctious, and when Elijah was younger he was able to open locked doors and run outside, but Linda always ran after him (*Id.*, p. 24). At the time, Linda lived on a cul de sac that had very low traffic (*Id.*).

Linda is a member of AA, and is also in therapy with Mr. Swartz regarding drug and alcohol use. She also continues therapy with Gloria Rouleau. In the past Linda has used marijuana and taken pain pills for PMS. (*Id.*, pp. 25-26). One time in September, 1999 Linda was drunk in Jewel's presence (*Id.*, p. 27). Linda grew up with an alcoholic father but has now learned to find other outlets when she is stressed (*Id.*). Linda takes Paxil for depression (*Id.*, p. 37). Linda does have a tribal court conviction for fraud, which arose when she tried to get benefits for Jewel ((*Id.*, p. 35).

Linda takes good care of her other children, all of whom have healthy teeth, no cavities, and general good health. Linda does the laundry, cleaning, cooking, bathes them and helps them brush their teeth, and plays with them as well (*Id.*, pp. 36-37). This testimony was supported by copies of surveillance reports prepared by the Protective

Services Division of the FIA, which made 13 unannounced visits to Linda's home, from October 1 to December 16, 1999, each time reporting "everything OK and looks good!" On the other hand, Jewel seems to be exposed a lot of illness, especially from Richard Jones, and her diet at the Joneses leaves her constipated most of the time (*Id.*, pp. 42-43).

While on the witness stand, Linda formally requested restoration of full physical and legal custody of Jewel (*Id.*, p. 46). That was the status Linda had as a result of the divorce judgment as to Timothy Beveridge (*Id.*). Linda had previously filed a written motion for restoration of her full custodial rights on May 17, 2001[6], in response to the Joneses petition for permanent custody that was filed April 12, 2001[7].

After closing arguments, the circuit court made findings of fact in which it addressed the statutory "best interests of the child" factors, finding that the Joneses should be preferred to Linda Davis as to custody of Jewel. However, the circuit court never mentioned either the constitutional issue of the superior rights of a natural parent, raised by Linda Davis' trial counsel in both his opening statement (TR I, pp. 5-7) and closing argument (TR III, pp. 37 ff), nor did it address the impact of the Indian Child Welfare Act, 25 USC §§1901 *et seq.* on this custody battle, another issue duly raised by Linda Davis' trial counsel in closing argument (TR III, pp. 31-36).

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[6] Lower court Register of Action Event #73. Linda Davis had previously filed a motion in the guardianship file, Iosco Circuit Court Case No. 99-2258-LG, for restoration of full custody on December 11, 2000 (Appendix 6).

[7] Lower court Register of Action Event #64.

Pertinent Provisions of
The Indian Child Welfare Act of 1978, PL 95-608
(Emphasis added to highlight the most pertinent sections)

25 USC §1901
Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds–
(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
(3) that **there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;**
(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 USC §1902

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 USC §1903

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include—

(i) **"foster care placement"** which **shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in** a foster home or institution or **the home of a guardian** or conservator **where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;**

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

* * *

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) **"Indian" means any person who is a member of an Indian tribe,** or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) **"Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;**

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

* * *

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and
(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 USC §1911

(a) Exclusive jurisdiction
An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
(b) Transfer of proceedings; declination by tribal court
In any State court proceeding for the foster care placement of, or termination of parental rights to, **an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent**, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.
(c) State court proceedings; intervention
In any State court proceeding for the foster care placement of, or termination of parental rights to, **an Indian child,** the Indian custodian of the child and **the Indian child's tribe shall have a right to intervene at any point in the proceeding.**

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 USC §1912

a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

* * *

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, **an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.**

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 USC §1913

a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, **such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.** The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was

interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

* * *

25 USC §1914

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, **any parent or Indian custodian from whose custody such child was removed,** and the Indian child's tribe **may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.**

25 USC §1915

* * *

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. **In any foster care** or preadoptive **placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—**

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority;
or
(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.
(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences
In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.
(d) Social and cultural standards applicable
The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.
(e) Record of placement; availability
A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

25 USC §1920

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or **has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.**

25 USC §1921

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

The Fourteenth Amendment to the Constitution, Section 1

(Emphasis added)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall** make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State **deprive any person of** life, **liberty**, or property, **without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

Petitioner's Mid-Trial ICWA §1913(B) Custody Demand **Appendix Q**

STATE OF MICHIGAN

IN THE 23rd CIRCUIT COURT - FAMILY DIVISION

FOR THE COUNTY OF IOSCO

LINDA JEWEL DAVIS (f/k/a BEVERIDGE),
Plaintiff,

Vs. File: 99-2099-DM

TIMOTHY BEVERIDGE,
Defendant,

_____/

Richard and Carolyn Jones,
Third Party Custodians

_____/

CUSTODY TRIAL – CONTINUED
VOLUME II OF III
BEFORE THE HONORABLE JOHN D. HAMILTON
Tawas City, Michigan - Friday, April 26, 2002

APPEARANCES:

For the Plaintiff:	KELLER & MOIR Edward M.Keller (P15809) 1864 North US-23 East Tawas, MI 48730 (989) 362-9930
For the Defendant: For the Third Parties:	IN PRO PER James Bacarella (P46198) 1228 East US-23 East Tawas, MI 48730 (989) 362-1364
Recorded By:	Diane Knafla, CEO #6370 (989) 362-3497

Petitioner's Mid-Trial ICWA §1913(B) Custody Demand

Appendix Q

Tawas City, Michigan
April 26, 2002 – 9:10 a.m.

EXCERPT OF PAGE 46

(Direct examination of Linda Davis):

* * *

Q. Are you asking that you be returned full physical and legal custody of your daughter.

A. Yes, I am.

* * *